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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted] 1644

VIRGIL D. DARDI,

Petitioner,

—v.—

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The Court of Appeals for the Second Circuit has handed down a decision on pretrial discovery and inspection under Rules 16 and 17(c) of the Federal Rules of Criminal Procedure that (i) is at odds with this Court's decision in *Bowman Dairy Co. v. United States*, 341 U. S. 214 (1951), (ii) ignores general rules of fairness in federal courts and requirements of due process of law under the Fifth Amendment to the United States Constitution, (iii) reverses a liberal trend of pretrial discovery in complex documentary cases by approving a theory of "prepare as you go", and (iv) sets out a vague rule of reversible error that will make it impossible to reverse a case ever in the Second Circuit because of denials of proper discovery and thus is an invitation to flaunt sensible pretrial discovery 31

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The Court of Appeals for the Second Circuit refused to draw the proper conclusion from the fact that the case was unnecessarily protracted by colloquy and acknowledged frightful wastes of time; as a result the Court's opinion stands for the proposition that an unnecessarily long trial does not make for reversible error even when there are actual incidents showing that the jury was disturbed by the length of trial and defendants prejudiced as a result 41

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The restrictions imposed by the trial court on the cross-examination of the witness Lehrich constituted (i) a denial of the right of cross-examination and thus of due process of law and (ii) an abuse of discretion under the federal rule of scope of cross-examination; the Court of Appeals ignored the law of conspiracy that made the "usual" rule of scope of cross-examination inapplicable and has set a seriously erroneous precedent 53

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As the Court of Appeals recognized, it was error for the prosecutor to state in summation several times that the witness Lehrich and the co-conspirator Eveleigh would have testified cumulatively to Guterma had they been asked proper questions by the prosecution, for, in effect, the prosecutor was testifying to his personal knowledge; but the Court of Appeals set out an erroneous vague rule of reversible error that, we submit, this Court should overturn 57

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The prosecution committed an act of misconduct when it brought a future prosecution witness before a grand jury during the course of the trial for the purpose, at least in part, of trying to gather evidence for use at trial; the Court of Appeals and the District Court erred in applying a subjective test to the conduct of the prosecutor in going beyond the scope of legitimate inquiry and set out a rule that permits prosecutors to aid current prosecutions by misuse of grand jury process 62

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The decision of the Court of Appeals allowed impeachment of the defense's key witness by a question addressed to a supposed warrant of arrest; but the exception to the usual rule was not safeguarded by the procedures required by *Michelson* v. *United States*, 335 U. S. 469 (1947) and the rule established would permit prosecutors to impeach by questioning on supposed arrests without having documentation of that arrest 69

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VIRGIL D. DARDI,

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PETITION FOR CERTIORARI

Petitioner Virgil D. Dardi prays that a writ of certiorari be issued to review a judgment which the United States Court of Appeals for the Second Circuit entered on March 17, 1964.

Opinion Below

The opinion of the Court of Appeals affirming the judgment of conviction is reported at 330 F. 2d 316 and is set out in Appendix A.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit with respect to which a writ of certiorari is sought was entered on March 17, 1964. A motion for rehearing was denied by the Court of Appeals on April 10, 1964. The time within which to file a petition for the writ was extended to June 9, 1964, by an order of Mr. Justice John M. Harlan.

The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Questions Presented*

1. Did the Court of Appeals for the Second Circuit in upholding a swift denial of all pretrial discovery and inspection under Rules 16 and 17(c) of the Federal Rules of Criminal Procedure: (i) lay down a rule at odds with this Court's decision in *Bowman Dairy Co.* v. *United States*, 341 U. S. 214 (1951), (ii) create a rule that ignores the requirements of fair procedures in the Federal courts and due process of law under the Fifth Amendment to the United States Constitution, (iii) reverse a trend of decision for liberal pretrial discovery in complex documentary cases by approving the District Court's theory of "prepare as you go", and (iv) set out a rule of reversible error which is not sanctioned by the case law and is an invitation to the district courts in the Second Circuit to flaunt sensible pretrial discovery rules?

2. Is there under the due proces clause of the Fifth Amendment to the United States Constitution a constitutional right or rule of fairness that would guard defendants against an unnecessarily long trial and does the Court of Appeals' decision in fact deny the existence of such a right or rule even when there are actual incidents showing that a jury was disturbed by the length of the trial?

3. Is there a rule of fairness or a constitutional right that makes it mandatory for a trial court to allow the full scope of cross-examination against a witness whose statements and acts, as testified by others, are before the jury and are binding against defendants under the laws in conspiracy cases; and in any event, did the District Court abuse

* This petition includes a number of points in detail and a rather lengthy review of some of the testimony in order to avoid the need for further discussion in other petitions in this case and at the request of other petitioners.

whatever discretion it might have in applying the usual federal rule of scope of cross-examination to a witness who participated in the acts that lie at the very heart of the alleged conspiracy?

4. Did the Court of Appeals set up an erroneous vague rule concerning reversible error in sanctioning the misconduct of the prosecutor in testifying in summation to his own knowledge of what two co-conspirators would have said had they been called to testify?

5. Did the Court of Appeals create an erroneous subjective test to evaluate the misconduct of the prosecutor in calling a prospective prosecution witness before a grand jury during the course of the trial when the District Court apparently found that the prosecutor had asked at least 45 questions of that witness that went beyond the scope of legitimate inquiry; and does that subjective rule of the Court of Appeals create a precedent that would allow a misuse of grand jury process in furtherance of a pending case so long as some overall excuse can be fashioned?

6. Is the Court of Appeals' ruling on impeaching a witness by a question addressed to a supposed warrant of arrest—without requiring the prosecutor (i) to make an offer of proof before asking the question and (ii) evidence documentation for his question—in conflict with the safeguards set out by this Court in *Michelson v. United States*, 335, 469 (1947)?

Statutes Involved

Pertinent constitutional provisions and the Federal Rules of Criminal Procedure are set forth in Appendix "B".

Statement

Mr. Dardi appealed from a judgment of conviction entered in the District Court for the Southern District of New York on March 5, 1963 (28877).* The indictment on which the case went to trial was returned on July 14, 1961.

The judgment followed a trial of more than 11 months before the Honorable William B. Herlands, United States District Court Judge, and a jury (1-27, 149). The trial is reported to be the longest federal criminal trial in history.

Mr. Dardi was found guilty by the jury on four counts of a 30-count indictment: counts 1, 2, 4 and 5. The jury deliberated for four days.

Count 1 charged a conspiracy to commit offenses in violation of 15 U. S. C. §§77e(a), 77e(c), 77q(a), 77x, 77i(a), 78j(b), and 78ff(a), and 18 U. S. C. §1341, and unspecified regulations promulgated by the Securities and Exchange Commission ("SEC"), and to defraud the United States by impeding the functions of the SEC.

Count 2 accused Mr. Dardi and other defendants of using the mails and instrumentalities of interstate commerce and the facilities of the New York Stock Exchange to effect a series of transactions in violation of 15 U. S. C. §§78i(a)(2) and 78ff.(a), and in violation of the accomplice statute, 18 U. S. C. §2.

Count 4 accused Mr. Dardi and other defendants of using the mails and instrumentalities of interstate commerce and the facilities of the New York Stock Exchange to effect a series of transactions in violation of 15 U. S. C. §§78i(a)(6) and 78ff, and in violation of the accomplice statute, 18 U. S. C. §2.

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* The numbers in parentheses refer to the pages in the record on appeal.

Count 5 similarly accused Mr. Dardi and other defendants of using the same facilities to effect a series of transactions in violation of §§78i(a)(6) and 78ff and the accomplice statute, 18 U. S. C. §2.

The trial court sentenced Mr. Dardi to seven years in prison by imposing consecutive sentences. Mr. Dardi was sentenced to 5 years under Count 1, the legal maximum, and 2 years under each of the substantive counts to run concurrently with each other but consecutively to the five-year sentence under Count 1. He was fined $40,000.

The Facts

We shall, first, describe the persons and corporations most pertinent to this Court's consideration of this petition. Next, we shall go into the testimony of the chief witness for the prosecution, Alexander L. Guterma, but only in the areas of proof which the Court of Appeals for the Second Circuit deemed relevant enough to sketch out in its opinion. Then, finally, we shall treat briefly the testimony in those areas of the other important witnesses—including defendant Herman Brann, the key witness against Mr. Dardi, and Mr. Harold McCollom, the key witness for Mr. Dardi.

We intend to show the facts (i) that this case was a close one as far as Mr. Dardi was concerned and (ii) that although all the participants at the heart of the conspiracy had pleaded guilty and promised to cooperate with the prosecution or, in fact, testified for the prosecution, most of the "facts" against Mr. Dardi relied on by the prosecution have to be inferred. Except for the testimony of defendant Brann, the prosecution's case largely rested on inferences, and so does the case as outlined by the Court of Appeals. And, significantly, every one of the key witnesses

in the case was either an alleged co-conspirator or a defendant who pleaded guilty; every one of them expected and did receive favorable consideration for their "cooperation".

Some of the Prrsons and Corporations Involved

Petitioner Virgil D. Dardi:

Mr. Dardi has been a leading and respected figure in many financial endeavors. He was never convicted of a crime before this case. His role in the matters that form the basis for the indictment here was pictured as peripheral by Alexander L. Guterma, with whom he became acquainted by chance.

Alexander L. Guterma:

Guterma, once the genius of Wall Street, now a five-time felon and admitted briber and perjurer, arranged for most of the events leading to the instant indictment. He was named as a co-conspirator and was the first and most important witness for the prosecution.

Samuel S. Garfield:

Garfield, together with Pasternak, were the true partners of Guterma in the several enterprises that formed the bases for several indictments; he was also in the oil business with Pasternak. Early in the trial, Garfield pleaded guilty to various counts in this indictment but has not been sentenced as yet. He is out on bail. Despite his promise to cooperate with the prosecution, he did not testify at this trial.

Irving Pasternak:

Pasternak was Guterma's other true partner. Well along in the trial, Pasternak pleaded guilty to several

counts in this and one other indictment and subsequently was sentenced to two and a half years with a provision for parole in 60 days. He is still not in prison. Although he promised to cooperate with the prosecution, he never testified.

Alan K. Swann:

Swann was a lawyer admitted to practice in four states. Swann represented Garfield's and Pasternak's interests closely and Guterma's interests occasionally in the various ventures that led to several indictments. When Garfield pleaded guilty at the trial, Swann followed suit; he has not yet been sentenced. He also promised to cooperate with the prosecution, but never testified.

Hyman D. Lehrich:

Lehrich was a New York lawyer who became general counsel, vice-president and a director of United Dye & Chemical Corporation. Although Guterma described in detail Lehrich's central role as his legal adviser, Lehrich, under oath, denied any wrong-doing. Lehrich was named a co-conspirator, not a defendant. He testified at the trial on the so-called "Bender incident"; but the prosecution asked no questions about his participation in the alleged conspiracy, and defendants were not allowed to cross examine him on it. The prosecution told the jury that his testimony on the subject would have been "cumulative."

Robert Eveleigh:

Eveleigh, named a co-conspirator but not indicted, was Guterma's bookkeeper and a close confederate of Guterma. Guterma made him treasurer of various companies under his control and used him whenever it was necessary to sign checks. He did not testify at trial, but the prosecution told the jury that his testimony would have been "cumulative."

Herman Brann:

Brann, an admitted perjurer, pleaded guilty to the indictment here during the course of the trial. Brann was a banker operating, in 1956, out of Tangiers and Geneva and effectively double-crossed Guterma, among others. He has not as yet been sentenced by the trial court. He testified at trial for the prosecution, although pictured as "a thief without honor" in the prosecution's opening.

United Dye & Chemical Corporation ("United Dye"):

United Dye was an old American company the stock of which had long been listed on the New York Stock Exchange. In 1955, United Dye was essentially a holding company with subsidiaries engaged in the chemical and insurance business and other endeavors.

Handridge Oil Company ("Handridge"):

Handridge was a company organized in the latter half of 1955 by Swann for Garfield, Pasternak and Guterma. After its creation, Handridge acquired substantially all the stock of Franklin County Coal Company.

Franklin County Coal Company ("Franklin County" or "Franklin"):

Franklin County was a corporation owned by the Murchison brothers of Texas. In June, 1955, Swann, on behalf of Garfield and Pasternak, negotiated the purchase of Franklin County. Franklin County owned a pipe line in the State of Wyoming and land in Illinois on which oil was discovered.

Bon Ami Company (*"Bon Ami"*):

A controlling block of the stock of Bon Ami, an ancient name in the cleanser field, was acquired by United Dye in May of 1956.

Guterma's testimony in the areas sketched out by the Court of Appeals

The Summer of 1955 (330 F. 2d at pp. 321-22)

In late May of 1955, Guterma sent his associate, Paul Hughes, out to look for office space and a real estate broker put Hughes in contact with United Dye, which was seeking to rent space. Hughes brought Guterma to the space, and Guterma met Mr. Dardi (3374-75). Guterma was then a public figure with a reputation of being a "wizard of Wall Street," and he proceeded to sell himself to Mr. Dardi as just that (Defs. Ex. AA, 3379-82, 3385-86a). Guterma secured the space, and continued to promote himself to Mr. Dardi as a "genius" (*ibid.*, 9682).

A short time after Guterma moved in, Mr. Dardi discussed the possibility of Guterma making an investment in United Dye, of which Mr. Dardi was Chairman of the Board (3388-92). Mr. Dardi told Guterma that he believed United Dye could be a profitable organization by hard work and the use of imagination in acquiring new subsidiaries (3401-02, 3405). Mr. Dardi showed Guterma annual reports and discussed his hopes for its bright future (3390-401). Mr. Dardi discussed the possibility of United Dye obtaining property from Foremost Dairies in exchange for United Dye stock and debentures and Guterma and Mr. Dardi looked into the possibility together (3402-03, 3373-74).

Mr. Dardi did seek to bring Guterma into the United Dye picture but only because he believed in Guterma and Guterma gave every indication that he was exactly what

his reputation made him out to be (715-16). Mr. Dardi said that if Guterma was willing he would try to buy the a controlling block of stock at $10 a share for Guterma (3405-06). At no time in Guterma's testimony was there any suggestion that any of this was done with a mind to break the law; there was no evil connotation to any of his testimony in this area.

Guterma and Mr. Dardi entered into a contract. Mr. Dardi agreed to obtain 30,000 shares of United Dye for Guterma; Mr. Dardi was given a six-month option to buy 15% of the stock at $10, but Mr. Dardi's price was to be slightly over $11 (Gov. Ex. 1). And so, because Guterma believed that United Dye would be a profitable company he bought 38,500 shares for $385,000 (3420).

Mr. Dardi tried all through the summer to put Guterma on the Board of Directors (3425-26). All the while Guterma discussed the future of the company with Mr. Dardi; as Guterma testified, all these conversations were aimed not at any illegal conspiracy but at creating a company that would blossom and prosper (3420, 3426-28, 3474). In a letter, Mr. Dardi outlined to Guterma the many things that he hoped Guterma would do to build a "tremendous company"; none of them had anything to do with anything but making United Dye a most successful company (Def. Ex. K; 5874-75).

The seamy side of Guterma's testimony lies not in what Guterma said his relationship with Mr. Dardi was and not in what he said or did with Mr. Dardi, but what he did with his *true partners*, Garfield and Pasternak.

Guterma had first become associated with Garfield and Pasternak in January and February of 1955 and became associated with them in connection with the purchase of the stock of Franklin County Coal Company in the summer

of that year (755, 756-57). Franklin County was a corporation owning extensive pipelines in Wyoming and coal and oil lands in Illinois. Pasternak, Garfield and Swann had been negotiating with the wealthy Texans, the Murchison brothers, to acquire Franklin County's stock; and in June of 1955 they requested Guterma to join with them in what was to be a total investment of about $3,000,000 (757). For the soundness of the investment, Guterma relied on the judgments of Garfield and Pasternak, who were experienced oil men (3946-50). It was the intention of Pasternak, Garfield, Guterma and Swann to merge Franklin at a later time with a company listed on the American or New York Stock Exchange (758-59). Division of the partnership profits among Pasternak, Garfield and Guterma was to be on an equal basis, with Pasternak and Garfield taking care of Swann, the lawyer, from their share (759). The arrangement that was worked out among these three was out of the sight and hearing of Mr. Dardi (759); the prosecution did not even attempt to show that Guterma told Mr. Dardi any of this.

In the summer of 1955, Pasternak and Garfield purchased the stock of Franklin County by making an advance of $800,000 and giving the Murchisons a note of Garfield and Pasternak for $519,000 (772-73). All the stock of Franklin County was pledged as security on the note (726). Swann told Garfield, Pasternak and Guterma that they would have to form a corporation that would own the Franklin County stock if eventually the assets of Franklin County were going to figure into the merger with a listed company (779 *et seq.*). This was the genesis of Handridge Oil Company, which was formed late in the summer of 1955 (781-82).

In the summer of 1955—so testified Guterma—he told Mr. Dardi that he, Garfield and Pasternak owned Franklin

County (787). Franklin, he said, owned a pipeline in Wyoming and that it would be a "very good deal" for United Dye to acquire Franklin County for an exchange of stock, on a basis similar to that which was contemplated for the purchase of the property from Foremost Dairies (787). Unlike the case of Guterma's purchase of Franklin County stock (3947-48), Mr. Dardi said he would be interested if it was "a businesslike proposition" and said that he needed further details concerning the financial condition and earning record of Franklin, and that he would have to put the proposition before the Board of Directors of United Dye (788). Guterma delivered the financial statements of Franklin County to Mr. Dardi (789-90). Guterma and his associate, Eveleigh, discussed with Mr. Dardi the financial condition and earning record of Franklin; and Mr. Dardi said that he would take the matter up before the Board of Directors (790). And in July or early August of 1955, the Board of Directors of United Dye appointed a committee of Mr. Dardi, alleged co-conspirator Lehrich, and Mr. David Fishman, another United Dye director, to pursue the matter (790-91). At no time did Guterma say that he told Mr. Dardi that the deal was bad or that there was a fraud involved or that there was any sort of cheat; indeed, he was representing to Mr. Dardi that this was a wonderful deal for United Dye (787-90). All through 1955, Guterma was to tout the merger to Mr. Dardi (919).

The Fall of 1955 (330 F. 2d at pp. 322-23)

On September 1, 1955, Guterma finally became a director of United Dye, an officer and, indeed, Chairman of the Board of Directors (801, 3793).

One proposed acquisition fell through—the Foremost Dairies deal (3882). The proposed Handridge merger, however, progressed. At a meeting held on September 1,

1955, the Board of United Dye passed Guterma's motion authorizing the executive committee of United Dye to engage an expert suggested by Guterma to prepare a report on the Plains Pipelines Division of Franklin County (5487, 5908-09). Mr. Dardi and the rest of the Board did not know that the expert was anything but an independent and good geologist (4024, 5902-03). At Board meetings in the fall of 1955, Guterma spoke and told the directors, including Mr. Dardi, that Franklin County had a tax loss of about $2,000,000 and that it would make money after recycling plans in the area were opened up and after water flooding went into effect. Guterma said that United Dye would make an amount somewhat under $2,000,000 and the profit would be offset by the tax loss—the income would all be tax-free (4017-20). Guterma told the directors, including Mr. Dardi, that he believed that Handridge would be a great vehicle for earnings and eventually United Dye would have a large net worth, particularly if they were prudent in making acquisitions (4020-1). Guterma told the directors, including Mr. Dardi, that they would have to pay more if they issued stock than if they paid cash for the properties to be merged in United Dye (4021).

Guterma also testified that he, accompanied by Mr. Dardi and Lehrich, spoke to officials of the New York Stock Exchange in the fall of 1955 (803-04, 808-09). On two of these occasions Guterma offered to loan his stock to brokers to cover short sales in a dangerously rising market (*ibid.*). There was nothing evil or bad about the offer to loan stock; and Guterma made nothing evil out of it. As Guterma stated, the listing agreement of United Dye provided for the lending of stock by its directors to brokers when there appeared to be a danger of a "corner" on the market (806).

Not only did Guterma *not* tell Mr. Dardi what he, Pasternak and Garfield were plotting, but he laid the foun-

dation to place the blame on Mr. Dardi if anything went amiss. The Court of Appeals, in its opinion, accepted a version of events here that ran contrary to Guterma's testimony and confuses several separate events (330 F. 2d at pp. 322-23): Mr. Dardi did not act in concert with Guterma and his group to sell United Dye stock.

Here are the facts according to Guterma. Early in the fall of 1955, Guterma met with Garfield and Pasternak; Mr. Dardi was not present (927). Guterma told Garfield and Pasternak that among them they had 30,000 shares of United Dye and that for the Handridge merger to go through, the market price for United Dye stock would have to be brought down to a more realistic level (927-28). Guterma saw two advantages in selling their United Dye stock. The sale of the 30,000 would tend to reduce the market price and it would give him, Pasternak and Garfield assurance of a profit in case the merger did not go through (927-28). In October, Guterma, Pasternak, Garfield, Swann and their friend Roen sold the stock. The profits were split among Guterma, Garfield and Pasternak (923-29, 1722-23; Gov. Exhs. 10, 11 and 12). *Of all these transactions, Mr. Dardi was unaware* (*ibid.*).

To cover himself on his side deal, Guterma also had a discussion with a Mr. Hoopman of the SEC in New York City on the subject of loaning shares to private individuals and secured Mr. Hoopman's approval, so long as the sales were not for Guterma's own account (1192-94). But again Mr. Dardi was not aware of this; there is no evidence that he was. Guterma does not say that he was.

Actually it appears that Guterma was deliberately misleading Mr. Dardi and even preparing to place the blame on Mr. Dardi if anything untoward happened. In a letter dated November 8, 1955, Guterma wrote to Mr. Dardi, accusing him of being a participant in a syndicate conducting

market operations in United Dye stock (Def. Exh. II). On November 10, 1955, Mr. Dardi wrote to Guterma and executed an affidavit; he denied the allegations in Guterma's letter. Mr. Dardi denied buying or selling any stock except the 6,500 shares that were acquired by Rialb Associates, Inc., in which Mr. Dardi had an interest, pursuant to his option agreement with Guterma and 1,000 shares sold around the first of October. Mr. Dardi said that he was as concerned as Guterma, apparently, about the market activity in United Dye (Def. Exh. JJ). Guterma said that he was happy to have received Mr. Dardi's letter and affidavit. (3883, 3918-27, 3939-41). On the very day Guterma was accusing Mr. Dardi of trading in United Dye stock (Def. Exh. II), Guterma himself had already delivered for sale, or ordered sold, at least 18,000 shares (Gov. Exh. 14).

Late Fall of 1955 and Early Winter of 1955-1956
(330 F. 2d at p. 323)

On December 5, 1955, the Board of Directors approved the merger between Handrid'ge and United Dye, if stockholder approval could be secured (Def. Exh. VV).

In December of 1955, Guterma invited some people to meet with him in Florida as his guests over the Christmas holidays. Mr. Dardi went to Florida during the holiday period and stayed at the Isle of Capri Hotel in Miami, but he did not go as Guterma's guest; he paid his own bill over the Christmas holidays (4081-82). Also present in Miami were Mr. Edward McCormick, President of the American Stock Exchange (4078-83) and Lehrich, Eveleigh, Culpepper, Pasternak, Leonhardt and Gerfield, who all came as guests of Guterma (910).

On direct examination, Guterma stated that he did not inform those whom he invited down to Florida why they were invited. Guterma said that there was not one general meeting in Miami at which all of the parties were present.

but rather there were a series of meetings in his penthouse atop the Isle of Capri Hotel (912, 916). Guterma told different things to different people. When he talked to Mr. Dardi, he discussed the possibilities of the Handridge merger and what it would do for United Dye. He told Mr. Dardi that Franklin County was a very good company and that it would be a money-maker and Mr. Dardi agreed with him. They also discussed the possibility of putting other companies into United Dye (919). Guterma remembered that he told Mr. Dardi that the merger with Handridge was a good thing for United Dye and it would bring revenue-producing assets into United Dye (3133-34).

When Guterma talked to Garfield and Pasternak, he said, they discussed the stock price of United Dye, the eventual disposition of the stock of United Dye and what the price of United Dye stock would be after the merger if the earnings of the pipeline were sustained (919-20).

Guterma said that when he had conversations with Garfield and Pasternak about the disposition of the United Dye stock, Mr. Dardi was *not* present (921).

One significant event during this gathering in Miami came out in the testimony of broker-dealer Leonhardt, months later in the trial. It highlighted Mr. Dardi's role as an outsider in Guterma's plans. Guterma took Leonhardt aside and told him of his plan to get rid of Mr. Dardi (9705-06). Guterma told Leonhardt:

> "I say to you in great confidence that I am arranging to have Mr. McCormick, the president of the American Stock Exchange, resign from the American Stock Exchange and to become president of United Dye & Chemical and I will guarantee Mr. McCormick's salary, capital gain, and other benefits" (9706).

Mr. Dardi paid his own way; Mr. Dardi was told of a bright future of United Dye; Mr. Dardi was not part of the conversations dealing with the plot to sell the shares of United Dye stemming from the Handridge-United Dye merger; Guterma plotted to replace him—this is the heart of the Christmas "meeting" of 1955 for Mr. Dardi, a pariah to Guterma.

The Spring of 1956 (330 F. 2d at p. 323)

In April, 1956, Mr. Dardi informed Guterma that a controlling block of shares of the Bon Ami Company was available, and could be purchased and that the purchase of these shares would secure control of Bon Ami for United Dye. Mr. Dardi showed Guterma a balance sheet of Bon Ami. It was sound and in a strong cash and liquid position, although not making much money; it had, indeed, $3,000,000 in excess of its current liabilities. Mr. Dardi said that 60,000, out of an outstanding 200,000, shares of Bon Ami stock were being offered at $27.00 a share by a group headed by a Mr. Cummings. Mr. Dardi proposed that he would talk to Mr. Cummings on what looked like, and was, a wonderful business opportunity for United Dye (1343-47).

Guterma spoke to Pasternak and Garfield, but what he discussed with them was more than the desirability of acquiring Bon Ami. Out of the presence of Mr. Dardi, Guterma went into the problem of paying the $519,000 to the Murchison brothers so that the pledged Franklin stock could be delivered free and clear upon the merger of United Dye and Handridge. Garfield and Pasternak claimed they did not have the money. Guterma told them that if they acquired control of Bon Ami, he would arrange it so that a loan would be made to Garfield to pay off the Murchison brothers. Pasternak and Garfield fell into line (1352-54).

Back to Mr. Dardi went Guterma in New York City. Mr. Dardi said he had contacted the Cummings group and they would sell 60,000 shares of Bon Ami for $1,300,000 in cash and a note for $320,000. Guterma told Mr. Dardi that United Dye did not have the money to buy the stock, but that United Dye would have the $750,000 coming from Handridge after the merger. Guterma suggested to Mr. Dardi that money could be lent to Garfield and Pasternak and they in turn could lend the money to United Dye to assist United Dye in making the Bon Ami acquisition (1354-57, 1357).

Lehrich, the lawyer, was consulted and he said that it would not be a violation of the merger agreement for Garfield and Pasternak to deliver $519,000 to United Dye and have United Dye assume their indebtedness to the Murchisons. If that were done, then United Dye would have $519,000 to use—a good thing, of course, for United Dye. Guterma instructed Mr. Dardi and Lehrich to make the necessary arrangements to acquire the 60,000 shares of the Bon Ami stock (1354-55).

Guterma had no further discussions with Mr. Dardi about the Bon Ami purchase before the closing of the Handridge-United Dye merger and the Bon Ami stock-purchase (1355). Guterma instead spoke to Swann (Pasternak's and Garfield's attorney) and Garfield. Guterma informed Swann that Bon Ami would make a loan to Garfield and instructed Swann to speak to Lehrich in order to work up the documents (1356-7). To obtain the $1,300,000, United Dye, he said, would have to get short term loans from banks and some of Guterma's companies, and get a prepayment of the $519,000 from Garfield and Pasternak and an additional advance of funds from Garfield (1357-8).

Most of the testimony concerning how the Guterma-Pasternak-Garfield partnership acquired its money was en-

tirely unnecessary and over-dramatized into the appearance of "looting" of Bon Ami, *of which there is not any true evidence* and which the prosecution stipulated out of the case by not questioning the value of bonds sold to Bon Ami (2683, 2693). One fact is certain from Guterma's testimony: Mr. Dardi believed the acquisition of Bon Ami was in the best interests of United Dye (1343-44).

The Balance of 1956 (330 F. 2d at pp. 323-24)

As part of the December 5, 1955, agreement to merge Handridge with United Dye, Pasternak and Garfield guaranteed the return of $2,400,000 by December 31, 1957, from the Plains Pipeline Division of Franklin County. Garfield and Pasternak deposited 85,000 shares of United Dye stock with United Dye as security for this so-called "throughput" guarantee. If the pipeline company returned $2,400,000 in the period, then all the shares were to be returned by April 15, 1958; but 1,000 shares were to be surrendered to United Dye for each $12,000 of deficiency. United Dye, no matter what happened to the pipeline company, would have to hold its security until the period ran (1535-6, Gov. Exh. 7, Sec. 11).

After conferring with Garfield and Pasternak, Guterma, at a meeting of the Board on June 6, 1956, told the directors of United Dye that in view of the drop-off in the amount of oil going through the pipeline, it was advisable to consider a transaction with Garfield and Pasternak whereby the guarantee under the merger agreement would be released. All the directors agreed that a figure of $700,000 to $900,000 was good consideration for the release (4225-26). The matter again came up at the meeting of the Board of Directors on July 23, 1956. Guterma as Chairman announced that negotiations had been going on with Garfield and Pasternak concerning the release of their guarantee

for a consideration of $700,000 (4226-28). At a meeting of the executive committee of United Dye, Guterma announced that a transaction had been worked out with Garfield and Pasternak whereby they would be released from their guarantee. Guterma read geological opinion letters, and he read an opinion letter of the law firm of Weisman, Celler, Allen, Spett and Sheinberg, which said that release of the guarantee would be perfectly legal (4228-32, Def. Exh. D (2d) I-V). Guterma informed the directors that there was a very good reason for United Dye releasing the stock, and indeed there was. No one could tell in August of 1956 what the market price of United Dye stock would be in April of 1958; and no one could say whether or not the pipeline division would return income of $2,400,000 by the cut-off date. Mr. Guterma told the directors that United Dye would be much better off having cash and securities in hand in 1956 than having the possibility of taking some of its own stock back as late as April 15, 1958. To use a *cliché*: the directors, including Mr. Dardi, were told by Guterma that a bird in the hand was worth two in the bush (4293-95).

And so the release was given for $450,000 in cash and 115,000 shares of stock of a company called D. C. M. (1540). Here again, Guterma succeeded in convincing Mr. Dardi and his fellow directors—some of whom were concededly not co-conspirators in this case—that the release was in the best interests of United Dye.

It was a fact, said Guterma, that he had an agreement with Garfield and Pasternak in December of 1955 that after the United Dye-Handridge merger, a great part of the United Dye shares received by them would be sold to obtain the proceeds (1644-45). The Guterma-Pasternak-Garfield deal to sell, discussed in the absence of Mr. Dardi, called for Guterma to work out the time and circumstances

of the sales in the over-the-counter market. In the meantime, to keep the price from dropping, Guterma was to buy up large blocks of stock as they appeared on the New York Stock Exchange. The "stabilization" program was worked out with Hughes; nominees or "beards" were to be used (1645-48). The cost of stabilization program was to be borne by Guterma, Garfield and Pasternak. Mr. Dardi was not involved in this financial deal; and Guterma did not testify that he informed Mr. Dardi of it (1644-45).

But in June, 1956, Guterma discovered that Pasternak had sold 10,000 shares on the New York Stock Exchange and that he—Guterma—had bought them (1590-97). Angry Guterma called Pasternak in Denver, and Pasternak admitted that he sold 10,000 shares of United Dye stock without notifying Guterma because he "needed" the money. Guterma told Pasternak that Pasternak wasn't supposed to sell the stock without telling him and that Pasternak was disrupting the market. Guterma said that he would talk to Garfield, who was in Michigan, about it. Pasternak said that he would think over Guterma's "request" not to sell any more shares pending word from Garfield (1596-97). Guterma met Garfield in Detroit. There, in Guterma's presence, Garfield telephoned Pasternak. Garfield told Guterma that there was no way to dissuade Pasternak from selling the stock unless Guterma agreed to an immediate distribution. Finally, Guterma agreed that he would return to New York and organize a sales force of over-the-counter brokers to distribute the major portion of the United Dye stock, provided Garfield and Pasternak assured him they would not sell any more shares on the New York Stock Exchange and would channel all the stock through him. Garfield then telephoned Pasternak in Denver, and Garfield told Guterma that he had obtained assurances from Pasternak that he would not

sell any of the shares in the open market (1597-1600). Of all this, Mr. Dardi was unaware.

When Guterma returned to New York he notified Paul Hughes—not Mr. Dardi—that he was going to "distribute" the United Dye stock and that he was going to continue to support the market in the meantime on the New York Stock Exchange (1600-01).

Then Guterma spoke to various brokers about selling United Dye stock on the over-the-counter market (1618-38). And the three partners began to sell their stock.

It was only at the end of Guterma's story that Guterma arrived at Herman Brann, the man described by the prosecution in its opening in terms of a thief without honor (419). Some time in July of 1956, in New York City, Mr. Dardi introduced Guterma to Brann. Mr. Dardi did not know Brann well; he had once been introduced to him several years before briefly by one Fabian Mayers (12858). Mr. Dardi thought Brann was a very influential international banker (1665). According to Guterma, Mr. Dardi told Guterma before meeting with Brann that Brann could sell shares of United Dye stock in Europe and in North America and that Brann had a bank in Tangiers. Guterma did not testify that Mr. Dardi told him that Brann should be used to stabilize any market (1664-65).

Mr. Dardi arranged an introduction of Brann and Guterma in July of 1956 in the apartment of one Ira Gilden at the Waldorf Towers in New York City. Mr. Dardi, Mayers, Brann, one Harry Adams, an Air Force officer, and Guterma were present in the Gilden apartment. Guterma said that he then had a conversation with Brann relating to shares of United Dye (1666-67). During the conversation between Guterma and Brann, Guterma did not know exactly where Mr. Dardi was standing, but Mr. Dardi was

talking to Mayers for a time. (4302-03, 5949-50). In fact, according to Guterma, Mr. Dardi and Adams left a half hour or 45 minutes after they arrived (4304). Guterma actually did not make any agreement with Brann to help "stabilize" any market or to buy any stock in Europe while Mr. Dardi was present or even that day (4388). Guterma said the arrangement with Brann was made later by him—not Mr. Dardi (4389).

The arrangement that was finally worked out by Guterma was that Brann would buy United Dye stock on the New York Stock Exchange—taking advantage of the 30% margin requirement as opposed to the 70% margin requirements in the United States (1668-69). The money was to be supplied by Guterma, who was in charge, but the money was to be delivered by Guterma's associate, Louis Levin (1669-71). Eventually Brann started to perform for a group called "Marco Polo". According to Guterma, the Marco Polo group was a joint venture among Brann, Mayers and Rand—and did not include Mr. Dardi (4415-16).

According to Guterma it was he, Guterma, who introduced Levin to Brann and sent Levin to Tangiers or Europe to visit Brann twice in 1956 (1672, 4415). Guterma had heard from Paul Hughes that Brann was not doing what he was supposed to do in "stabilizing the market". While he was buying the stock and charging a fee for it, Brann was dumping the stock right back on the New York Stock Exchange, "back-dooring". Guterma (not Mr. Dardi) told Levin to go to Europe and liquidate Brann's accounts, which he did. According to Guterma, $180,000 had been sent to Brann and Levin brought back less than $60,000 (1672-73).

The Final Accounting Among the True Partners: The Fall of 1956-Winter of 1957
(*Cf.* 330 F. 2d at p. 324)

Guterma said that his program to sell the Haudridge stock and keep the market stable lasted until October of 1956 (1673).

In October, Guterma flew to Clare, Michigan, to meet with Garfield, Pasternak, Eveleigh, Roen and Eli Boyer, an accountant employed by Garfield and Pasternak. Mr. Dardi, of course, was not present, for the group discussed the liquidation of all accounts among the three true partners and the division of the spoils. Boyer and Eveleigh were instructed to prepare the final accounting on all ventures in which the partners had participated (1675-80). The share was to be ⅓ for Garfield, ⅓ for Pasternak and ⅓ for Guterma (1681). There was no share for Mr. Dardi (1681-82).

There was then a real meeting in January of 1957 in the Eden Roc Hotel in Miami Beach. This time the meeting was in Garfield's suite. Present at this meeting were Garfield, Pasternak, Roen, Eveleigh and Guterma. Mr. Dardi was not there; for this was the final accounting among the true partners. The meeting lasted all day. Eveleigh and Boyer had prepared the accounts; and the true partners and their true associates discussed each item (1720-26).

There was no discussion about paying off Mr. Dardi or giving him anything or taking into account any money given him; he figured not a whit in this settlement (3359-74). Mr. Dardi's participation in this settlement was nothing because, as Guterma said, there was nothing coming to him (3373-74).

The "Bender Incident" (330 F. 2d at pp. 333-34)

Guterma also exculpated Mr. Dardi from the so-called "Bender incident." We avert to it briefly.

There was testimony by Guterma that Garfield was making arrangements or tried to make arrangements through the then ex-Senator Bender to have the SEC discontinue its investigation of the United Dye situation (1750). Garfield claimed that he had arranged to pay Bender $100,000 to contact the Chairman of the SEC (1788-92). Lehrich went down and saw Bender and gave him a written memoranda of the facts for presentation by Bender to the SEC Chairman (1792-95).

Guterma testified that early in 1958 he spoke to Mr. Dardi about contributing to the "Bender fund". Here is what Guterma testified to:

> "Mr. Dardi told me that Mr. Garfield, and I believe it was Mr. Lehrich also, tried to collect the $20,000 from him but that he wasn't going to pay the money, that he didn't want to have anything to do with this affair" (1797).

When the testimony was over, the trial court instructed the jury that "as far as defendant Dardi is concerned [Guterma] exonerated and exculpated the defendant Dardi with respect to the so-called Bender incident" (1852).

Conclusion

Thus, Guterma's testimony erected the structure for the prosecution's claims of conspiracy or, more properly and realistically, conspiracies. Guterma said he plotted with Pasternak, plotted with Garfield, plotted with Swann, plotted with Brann, plotted with Eveleigh, plotted with Hughes,

plotted with Lehrich, plotted with Roen. But he would not say that he plotted with Mr. Dardi except to make United Dye a great and wonderful company; he would not place Mr. Dardi in the heart of his schemes. There were intimations and documentary evidence that he duped Mr. Dardi, who was pictured by him as a most gullible person.

Other witnesses, Brann and McCollom

From the time Guterma left the stand to the time that defendant Brann, who pleaded guilty in the interim, took the stand, no witness changed the picture of Mr. Dardi and his relationship to the "in-group," nor the import of the evidence that showed Guterma had gulled Mr. Dardi.

No witness changed the facts that after September 1, 1955, Guterma was boss and Guterma was the true partner of Pasternak and Garfield (with a junior partnership to Swann). No witness changed the tone of Guterma's testimony on Mr. Dardi's innocent involvement with what the prosecution called the early "phases" of its alleged "single conspiracy." Garfield never testified. Pasternak never testified. Swann and Eveleigh never testified. Roen never testified. Lehrich was called by the prosecution, but did not testify on matters relating to the facts of the conspiracy charged in the indictment.

Attorney Leonhardt, the admitted perjurer and Guterma's former partner in the securities business, placed Mr. Dardi far from the inner operations of Guterma's schemes. He established Guterma's plot to oust Mr. Dardi (9705-06). Leonhardt did say that either Mr. Dardi or Guterma told young Paul Hughes to give Leonhardt brochures some time following the merger of Handridge into United Dye. But all that was surmise; he couldn't remember who it was (9385-88). The conversations that Leonhardt had with Guterma about the distribution of the stock emerging from

the Handridge-United Dye merger were not in Mr. Dardi's presence (*e.g.*, 9174-75, 9178-80). Even Leonhardt was told by Guterma that his selling of the United Dye stock would be completely legal and lawful (9720-22); and Leonhardt said that he never intended to violate the SEC laws (10008).

Paul Hughes, Guterma's "errand boy" and admitted perjurer, was called by the prosecution, and testified about many events. Again, he did not place Mr. Dardi close to Guterma or to the Guterma-Pasternak-Garfield partnership. Hughes testified that in the summer of 1956 Mr. Dardi was in the habit of asking him how sales of United Dye stock were going (11933-36). At this point in time, Hughes admitted, Mr. Dardi was in charge of sales promotion of Bon Ami and was spending much of his time out of town and at 17 Battery Place, Bon Ami's office (12115-17).

From Hughes also came testimony that he prepared publicity material and showed it to Mr. Dardi which after everything was said and done was about a 95¢ reprint of the United Dye annual report (12008 *et seq.*).

The stock salesman, ex-convict Barkley, who was forbidden to sell stock, also testified for the prosecution. He spoke of how Guterma brought him into the selling picture; but again Mr. Dardi was not present during the Guterma-Barkley deal to market stock stemming from the Handridge-United Dye merger (16693-702). All that Barkley could say against Mr. Dardi was that Mr. Dardi also asked him, "how are sales going?" (16780).

The prosecution revisited the Bender affair by calling attorney Lehrich, named as a co-conspirator. Lehrich testified that he was not involved in any conspiracy. His testimony about the Bender affair differed in significant respects from that of Guterma (18462-640). Lehrich flatly denied

that Garfield told him, before he went to see Bender, that Garfield had arranged to pay $100,000 to the ex-senator from Ohio (18466-68). According to Lehrich, his trip to Bender was a legitimate trip, not something nefarious. His duty was to go down to Washington to present an argument to the ex-senator that an injustice was being done. At the time, the ex-senator had nothing to do with the SEC. He was working on a day-to-day basis as a consultant of some kind to the Department of the Interior. When in Washington, Lehrich said that he dictated what he described was a fair summary of the facts before the SEC, the only mistakes being typographical errors (18780-82, 18919 *et seq.*).

Lehrich testified that some time after the event, and exactly when and where he could not say, he spoke to Mr. Dardi about contributing to Garfield's $100,000 fund, fee of whatever it was in the Bender affair (19099-101). According to Lehrich, Mr. Dardi said that he didn't have the money and couldn't pay at that time, but would do so later (18190-91). The substance of Lehrich's testimony was that Mr. Dardi had evidenced some sort of willingness to contribute to the transaction that Lehrich was involved in, a transaction that was in Lehrich's view totally proper (18959-60).

Brann's testimony and the defense

Late in the trial, Herman Brann took the stand. In June, he had pleaded guilty to two counts in the indictment and had promised to cooperate with the prosecution (7243, 7786). He came to the stand armed with all sorts of documents—letters, telegrams and telexes, documents that he swore before the SEC he never had (15098-102, 15123-26). After having sat in court and having heard Guterma's testimony, and with all these exhibits before him, Brann pro-

ceeded to construct a web that entangled Mr. Dardi in selling United Dye stock and that contradicted Guterma.

The only point on which Braun agreed with Guterma was that Mr. Dardi introduced Braun to Guterma in a hotel room in New York; but even as to the hotel room Braun and Guterma contradicted each other. Braun did not say that Mr. Dardi left a half hour later and before Guterma, but that Guterma left first (12879-80). Where Guterma put himself, Braun put Mr. Dardi, the only defendant still on trial with whom he had contact. So it was that Braun testified that Mr. Dardi, not Guterma, explained to him the type of stabilization program that was to be entered into (12280). Although Braun admitted that he made his deal with Guterma, he claimed that it was Mr. Dardi who was in contact with him in Europe with respect to the operations of his trading. Levin, Guterma's agent according to Guterma (1671), became Mr. Dardi's agent. The "Marco Polo" group of Braun, Mayers and Rand was made to include Mr. Dardi.

Braun effected this transformation with documents that referred to "fat boy"; and Braun testified that "fat boy" was Mayers' nickname for Mr. Dardi, and not for Guterma (12948).

But even on direct examination Braun was shown to be the thief without honor. He "back-doored" the stock and double-crossed Guterma (13096). He did lie to Levin, Guterma's agent, saying he had stock which he already sold (13277 *et seq.*), and pretending that brokers were calling him for margin on stock already sold (14742-45). On cross examination, his account of his financial arrangements became gibberish, and he jumped from story to story as he was caught in lies (*e.g.*, 14924-25, 14926-27, 15312, 15441-45).

There are many things to say about Brann's lack of credibility; how one document that Brann swore was sent *before* any SEC investigation and could not be self-serving turned out by exposure to have a reference to an SEC investigation on the fifth page (Gov. Exh. 876, 15298-99); how a "straddle" transaction turned out to have one vital missing element, a maturity date on the call side (13998-14003, 14007-10, 5437). The point is that Brann was a double-double dealer, who did and was capable of counterfeiting documents to save himself, and Mr. Dardi had a rebuttal of Brann's testimony in large part through the documents and testimony of Brann himself.

In addition, Mr. Dardi called Harold McCollom, who Brann had testified dealt with him in United Dye stock. Mr. McCollom came from Europe and put the lie directly to Brann: there was no straddle with or without a maturity date (18898, 19816-19, 19829-30). He told the jury that the cables put in evidence through Brann were complete forgeries (Gov. Exh. 866, 860; 19923, 19937). Indeed, one of the telegrams was supposedly sent from Geneva when Mr. McCollom was in Italy; the others contained a date stamp a year prior to the date it was supposed to have been sent. Another letter in evidence addressed to Mr. McCollom was never received by him (Gov. Exh. 854; 19918). McCollom said that no one ever mentioned Mr. Dardi's name to him until late 1957 and that he did not meet Mr. Dardi until March of 1958 even though he was supposedly Brann's associate in two banks in the summer and fall of 1956 (19945-46). He told of seeing Brann with blank stationery of the Moroccan Bank long after the Moroccan Bank had vanished (19943).

REASONS FOR GRANTING THE WRIT

1

The Court of Appeals for the Second Circuit has handed down a decision on pretrial discovery and inspection under Rules 16 and 17(c) of the Federal Rules of Criminal Procedure that (i) is at odds with this Court's decision in *Bowman Dairy Co.* v. *United States*, 341 U. S. 214 (1951), (ii) ignores general rules of fairness in federal courts and requirements of due process of law under the Fifth Amendment to the United States Constitution, (iii) reverses a liberal trend of pretrial discovery in complex documentary cases by approving a theory of "prepare as you go", and (iv) sets out a vague rule of reversible error that will make it impossible to reverse a case ever in the Second Circuit because of denials of proper discovery and thus is an invitation to flaunt sensible pretrial discovery.

The indictment on which Mr. Dardi was tried was returned in July of 1961. The indictment superseded two other indictments—one returned in 1959, the other in 1960.

On September 25, 1961, Mr. Dardi's counsel and other defense counsel filed motions for discovery and inspection under Rules 16 and 17(c) of the Federal Rules of Criminal Procedure and motions for bill of particulars under Rule 7(f) of those rules (27518-609). Mr. Dardi's demands were set out in a schedule of 55 items; they not only categorized documents but asked for particular documents; one other counsel, with whom all defendants joined, itemized 88 items, which also included specific documents. And one defense counsel listed 13 categories of documents (27577 *et seq.*, 27421-37, 27340-43).

Nowhere in its briefs on appeal did the prosecution argue that the documents that were requested were not within the *objective criteria* set out by this Court in *Bowman Dairy Co.* v. *United States*, 341 U. S. 214 (1951), and the cases that have followed that line of decision. See, *e.g.*, *United States* v. *Iozia*, 13 F. R. D. 335 (S. D. N. Y. 1952); *United States* v. *Gross*, 24 F. R. D. 138 (S. D. N. Y. 1959). The documents requested under Rule 17(c) and Rule 16 were evidentiary in character (indeed, most documents offered in evidence by the prosecution fell within the categories listed by defendants), were furnished the prosecution by others either voluntarily or through service of process, and could not be gotten by defendants by other means. Most of the documents had been in the possession of the prosecution for several years. There can be no question that the material would have been useful to the defense; the prosecution was later to offer some of the documents by differently categorizing them, if certain concessions were made (28442, 28842-46, 29353).

On September 28, 1961, Mr. Dardi's counsel wrote to the prosecution requesting a conference to discuss the question of stipulating items for discovery and particulars (28463).

The prosecution ignored this request. Its next step was to apply, on November 14, 1961, for the appointment of a single judge in the District Court under the District Court's rule regarding complex cases on the ground that "the required volume of evidence, by itself, precludes this case from being considered a simple criminal case" (27950-51). There was no question that this was going to be a complex documentary case—as it proved to be.

The Chief Judge of the District Court heard argument, granted the prosecution's motion for the appointment of a single judge, but deferred that appointment. The Chief Judge noted his concern for a proper pretrial procedure

in this case and recognized in this type of case, with its "required volume of evidence", the need for full documentary disclosure by the prosecution. He thought that the single judge "may well direct the government to give a list of witnesses the government expects to call so that defendants may have an opportunity to prepare in advance for cross-examination" (27983). He anticipated that the prosecution would turn over *all* documentary proof in order to speed up the trial and enable the defendants to prepare for this documentary case. He said: "After it is granted, and I do pick out a judge, I feel quite certain that by proper application you will get a disclosure of all documentary proof" (27985).

And, of course, the trend in these involved documentary cases involving Securities Act violations has been to give broad pretrial discovery so that it would be possible to prepare an adequate defense; and the trend has been to give sufficient time for accountants and attorneys to go through the mass of documents. See *United States* v. *Schindler*, 24 F. R. D. 142 (S. D. N. Y. 1959); *United States* v. *O'Connor*, 237 F. 2d 446 (2d Cir. 1956); *United States* v. *Greater Blouse, Shirt & Neckwear Contractors Ass'n*, 177 F. Supp. 213, 222-25 (S. D. N. Y. 1959); Note, *Pretrial Disclosure in Criminal Cases*, 60 YALE L. J. 626, 633-39 (1951); *Developments-Discovery*, 74 HARV. L. REV. 940, 1059 (1961); see also *United States* v. *Duncan*, 22 F. R. D. 295 (S. D. N. Y. 1958); *United States* v. *Tellier*, 19 F. R. D. 164, 169 (E. D. N. Y. 1956).

The expectations of the parties and the Chief Judge of the District Court were dashed by the single judge who was assigned to the case in December of 1961. Following adjournments of the motions after the single judge was appointed at the instance of the prosecution and the judge, a hearing was held on the pretrial motions on February 5,

1962. Three days later the trial court handed down its decision: all defense motions denied; the trial to commence in eighteen days as requested by the prosecution (28481).

While proper pretrial discovery under Rules 16 and 17(c) has no connection with concessions that were going to be made or were asked to be made by the defense, we set the record straight for this Court: there was nothing offered by the prosecution or the trial court that was an adequate substitution for proper pretrial disclosure on any meaningful basis.

On February 8, the prosecution filed a voluntary bill of particulars that dealt primarily with statements that were going to be claimed false or misleading, names of persons to be proved as the persons to be defrauded and a few minutiae (28371). This was followed by two full court days of pretrial conferences out of the eighteen days inclusive of Saturdays and Sundays that were available to the defense for preparation (28461).

Here in summary are the events following the filing of the eight-page bill of particulars:

February 15, 1962 — A day-long pre-trial conference was held (29307 *et seq.*).

The prosecution offered a list of 68 categories of documents that were to be made available upon reasonable notice before trial (12 days away) at its offices during working hours. The records consisted of brokerage and bank records. The prosecution and the court refused to adjourn the case (28432-35, 28456-60).

The trial court hoped that counsel would agree to a stipulation which would cover specifically enumerated documents *after* defendants had seen the documents (29353).

February 16, 1962 — The prosecution served a list of 44 other categories of documents which were not to be turned over unless the defendants made as then specified concessions (29353, 28442). These were the truly meaningful documents secured from various third parties.

February 16-19, 1962 — Defense counsel looked at documents in the 68 categories and discovered that they were in cartons in two rooms; less than 1% of these documents had ever been seen by Mr. Dardi's counsel before; most had been in the possession of the SEC and the prosecution for years (29377-415). It took one defendant, attorney Swann, 12 to 13 hours to examine *part* of the *first* category offered (29377).

February 19, 1962 — A second pre-trial conference was held (29354-55).

The prosecution offered only one stipulation directed at the 44 categories of documents which (a) required defendants to sign before they saw the documents; (b) set no time for the production of documents; (c)

did not contain any specific enumeration of documents but related back to the 44 categories; and (d) was incomprehensible. (See stipulation placed in record in Court of Appeals by consent.)

Defendants negotiated in good faith all day, but could not agree to the stipulation offered by the prosecution.

No adjournment in the trial would be allowed to see any documents.

February 21, 1962 — The prosecution pre-marked 800 exhibits with sub-exhibits; defense counsel were not allowed to see exhibits—contrary to the expectation of the Chief Judge—and were shunted to the rear of the courtroom during the marking (2935?).

February 26, 1962 — All defense counsel moved to adjourn the case so (a) they could look at the documents in the 68 categories; (b) work out further discovery if possible; (c) have time to prepare their case. *The motion was denied on the ground that counsel could prepare as they went along* (2854, 2936? *et seq.*).

February 27, 1962 — The case began.

The Court of Appeals has justified the District Court's actions by saying that appellants "were adequately informed of the charges against them" by means of the indictment that was filed in July of 1961 and an 8-page bill

of particulars voluntarily served on February 8, 1962.* It further noted that the "denial did not cut off the defense from information. On February 8, 1964, the Government served an eight-page bill of particulars and offered to make available some sixty-eight categories of documents." The Court of Appeals noted that there were opportunities for further preparation during the inordinate length of the trial and adjournments that occurred early in the testimony (1286). Then for the Court of Appeals "[l]astly and most determinative [was] the fact that [Mr. Dardi] makes no showing on this appeal that the facts would have been other or different had he had an additional year or six months in which to prepare. Nor does he point even now to any facts which could have been developed which would have so radically changed the fact picture that, in effect, a new trial should be granted" (330 F. 2d at pp. 328-29).

All of this was offered by the Court of Appeals not only in justification of the complete denial of pretrial testimony but in justification of the statement made by the trial court that counsel could "prepare as the case went along" (9409-10).

But the facts do not justify what the District Court did. Contrary to the Court of Appeals' statement, the issue is not whether defense counsel "approached the day of trial

* In its brief to the Court of Appeals, the prosecution justified all this by challenging the good faith of defense counsel—the so-called subjective criterion that supposedly arises from the *Borman Dairy Co.* decision of this Court. See *United States* v. *Iozia*, *supra*. As evidence, it stated that "for years" counsel for Mr. Dardi could have looked at the testimony of Mr. Dardi under the SEC rules. It did not mention that defense counsel did go to the SEC's office before trial to look at testimony; but they were prohibited from taking any notes (27146, 29414-16). That rule was only changed for them 8 days before trial after complaints to the trial court (29211, 29214-17, 29420, 29345 *et seq.*).

completely unprepared." And the trial court did "callously" tell them to "prepare as they went along". The sum of what the trial court did was to allow the prosecution to violate the rule of fairness "developing in the Federal courts" of which it spoke itself (29394). Apart from any discretionary power under any rules, there is a recognized "interstitial" rule that no defendant shall go into a case unreasonably unprepared; there is a rule of fairness that requires counsel not to have to prepare complicated cases with thousands of documents on an *ad hoc* basis leading to "goes and long stops"; there is a requirement to forego the "sporting theory" of a lawsuit, where the cards are all in the possession of the prosecution, for a concept of justice. See *United States* v. *Duncan, supra; United States* v. *Tellier, supra;* Kaufman, *Criminal Discovery and Inspection of Defendant's Own Statements in the Federal Courts*, 57 COLUM. L. REV. 1113, 1119-21 (1957); Note, 67 HARV. L. REV. 492, 495 (1954); *Developments-Discovery*, 74 HARV. L. REV. 940, 1059 (1961). When, as here, the facts cried out and the "sporting theory" was carried out to its ultimate, the denial of reasonable inspection and sufficient time to look at what was offered to prepare for trial amounts to a lack of "due process" and the denial of the right to have effective counsel in violation of the Fifth Amendment to the Federal Constitution. See *Application of Tune*, 230 F. 2d 883 (3d Cir. 1956), favorably commented on in *Ciccnia* v. *LaGay*, 357 U. S. 504, 511 (1958).

Apart from the incorrectness of the result factually, the decision of the Court of Appeals in this case stands for rules of the law that this Court should not leave intact. This is the leading case in the Second Circuit since the happier decision of *United States* v. *O'Connor, supra*, where the actions of the District Court concerning pretrial discovery in a criminal case have been challenged and commented

upon at length. Now the Circuit Court's multi-pronged rationale puts an abrupt end to the flow of decisions in the district courts that recognized the need for full documentary discovery in involved financial criminal cases. We submit that at every juncture the Court of Appeals' decision has set the clock back a decade or two, and set a precedent for abuse of discretionary powers under Rules 16 and 17(c) of the Federal Rules of Criminal Procedure, if not for violations of fundamental rights.

First, the Court of Appeals confuses the notion of notice of charges with discovery and production of documents to meet those charges under the *Bowman Dairy* case. Even if we were to assume that the indictment and the eight-page bill of particulars did give the defense proper notice of the kind of evidence that might come into the record the issue in these complex cases is not notice, but the affording of opportunity to meet the noticed charges by looking and discovering the records that were concededly relevant—the undifferentiated volumes of documents in the 68 categories, the more crucial documents lying in the 44 categories that were never truly offered and some of those first 800 exhibits.

Second, the issue certainly should never be whether counsel approaching the day of trial were "completely unprepared". The issue should be, and always was under the rule of the *Bowman Dairy Co.* case, whether they are sufficiently prepared by way of seeing documents to meet the charges against their clients and have their opportunity to discover useful documents. See cases cited *passim*.

Third, the Court of Appeals misfocuses the issue by emphasizing that counsel had "many opportunities for further preparation" during the course of the trial. The truly significant documents in this case were contained in 44 categories of document, which were never offered for view to the defendants, and the other documents falling into

categories delineated in the pretrial motions of the defendants and were never offered for view. As it did no good less than 12 days before trial to have an offer to comb through a roomful and more of complicated brokerage records—all of which the prosecution claimed were relevant in some way, but most of which were never offered in evidence (28456)—so it did no good to have weeks of adjournments during trial to see *no* records at all.

Fourth, the trial court's unfortunate "prepare as you go" view led to delays, months of delays. Because of it Mr. Dardi's counsel accepted the trial court's proposal to work on an abbreviated schedule (5611-13, 7383, 7400); defense counsel were embarrassed all through the trial into reading newly-seen documents on short notice in front of the jury and to cross examine under pressure, and the theory in practice led to long hours of work at night after the strain of all-day trial (*e.g.*, 7380-81, 7595, 9354, 15496, 18315-16). See 5 *Wigmore, Evidence* §1367-94 (3d Ed. 1940). The theory laid the bedrock for the road to eleven months and one week of trial, which itself was an abomination and should have required reversal below. The Court of Appeals ignored the obvious wrong and rather used the length of trial to excuse the lack of proper pretrial discovery—a curious rule to give the district courts.

Fifth, the Court of Appeals' rule that Mr. Dardi would have to show some radical factual change to prove that he was prejudiced on his appeal is tantamount to saying that at no time will a defendant secure reversible error as a result of denials of pretrial discovery in these most complicated financial cases. How can any counsel show anything from documents that are not seen before or during trial, unless miraculously or by some good fortune the documents fall into his hands after trial? See *United States* v. *Consolidated Laundry Corp.*, 291 F. 2d 563 (2d Cir. 1961).

How can appellate counsel know what trial counsel would have unearthed or how he might have used unseen specific documents? All the tools to prepare for this involved case lay with the prosecution; most of them still lie there.

2

The Court of Appeals for the Second Circuit refused to draw the proper conclusion from the fact that the case was unnecessarily protracted by colloquy and acknowledged frightful wastes of time; as a result the Court's opinion stands for the proposition that an unnecessarily long trial does not make for reversible error even when there are actual incidents showing that the jury was disturbed by the length of trial and defendants prejudiced as a result.

The Court of Appeals stated that long cases do not *per se* make for reversible error (330 F. 2d at p. 529) and, at first, indicated that this case was long because of (i) the nature of the law of conspiracy, about which it could do nothing, (ii) the necessary joinder of many defendants, and (iii) the complicated financial transactions involved (*ibid.*).

We recognize that sometimes long trials are an unavoidable evil. If that were all that were to this case and to the Court of Appeals' decision in this case, we would not urge this Court to review this case on the question of the length of trial.

But the fact is, as later made plain by the Court of Appeals, that this was not a case that was lengthened by natural causes. Nor is this a case—again made plain by the Court of Appeals—where we need speculate on the jury resentment of the inordinate length of the trial (*ibid.*).

Under the Court of Appeals' discussion of "colloquy", the Court of Appeals lays bare the fact that this case was too long from *unnatural* causes by at least five and a half months (*ibid.*). Based on the calculations made by the prosecution in its main brief to the Court of Appeals (pp. 143-44), this trial should have taken no more than two and a half months. Originally, the prosecution had estimated that the trial would take from six to eight weeks. The Court of Appeals concludes that "a tighter reign" by the trial court would have resulted in a materially shorter trial (330 F. 2d at p. 330).

We look briefly at some statistics placed in the record by the trial court. It noted that, as of October 31, 1962, there were 18,894 pages in the record. Of this, it observed that there are only 10,489 pages containing testimony of which 9,597 related to the case-in-chief; 892 pages related to testimony concerning the "Jencks Act and other proceedings". Colloquy consumed 8,405 pages.

It also found that there were 150 days in which court sessions, of some kind, were held; there were 23 normal working days in which no court sessions at all were had. There were 18 court days on which the court adjourned near or before 1:30 p.m. (19228-29a).

Later, the trial court placed in the long record more statistics. As of November 7th, 82 witnesses had been called; the trial record contained 9,814 pages which recorded testimony, but some 892 pages were devoted to ancillary matters, such as Jencks Act proceedings. Colloquy took up 8,838 pages (19734-35). Still later, the trial court placed more statistics in the record. It noted that as of November 15, 1962, there were 20,224 pages in the record; there were 1,067 prosecution exhibits marked, exclusive of subsidiary exhibits, and defendants' exhibits numbered up to 258 (20225-26).

The trial court's statistics, which do not cover the last three months of trial, credit too much to the amount of pages that were devoted to taking testimony of some kind. Apparently, it considered many pages as "testimony" although there were some colloquy and objections on them. The trial court's statistics did not give full significance to the number of days or parts of days that were "lost"; for it failed to take into consideration the many times that the court adjourned (i) early for the day, between 1:30 and closing time; (ii) started late; (iii) did not get into session after lunch or after a recess until well past the time set; or (iv) a combination of them.

The pattern of testimony-taking matched against colloquy and trial against delay sharpened after the court's observations. It reached the ultimate on Mr. Dardi's case as the court spent days requiring that defendants make "offers of proof" at the instance of the prosecution. Mr. Dardi's case was on from November 9 (19742) to December 18, 1962 (22752). Within the five weeks of Mr. Dardi's case, only 1,500 pages contained testimony, with some of it, of course, broken up by objections and minor colloquy. Over 1,200 pages of colloquy were recorded; something like 250 pages in addition were devoted to the trial court alone addressing itself to its problems and the reasons why things were done or not done by it (*e.g.*, 20426-31, 20801-27). In addition, there was some off-the-record discussion. In the time period, there were only 10 days where there was any substantial testimony taken, some six days where the proportion of colloquy to testimony ran about 50-50; and some 7 full days taken up with nothing but colloquy.

A final evaluation of the ratio of colloquy to trial testimony must consider one more factor: the off-the-record discussions, which from all hints on the record might have added five to six thousand pages on the colloquy "side"

(*e.g.*, 7052, 722a, 769, 1234, 1267, 1268, 1269, 1284, 1429, 1462, 1469, 1585, 1947, 1969, 1974, 2042, 2534, 2542, 2544, 2668, 3019, 3460, 3596, 3597, 3600, 3606, 3623, 4076, 4199).

Some measure of the malfunctioning of the trial is [illegible] by placing this pattern of colloquy, trial court soliloquy, and early dismissals and late beginnings in the context of the trial court's schedule. From the beginning of the trial to May 24, 1962, the jury was supposed to sit from 10:30 a.m. to 1 p.m. and then 2:15 p.m. to 4:30 p.m. Beginning on May 24, 1962 and ending on June 21, 1962, the jury was supposed to sit to hear evidence from 10 a.m. to 2 p.m. with a "twenty-minute" coffee break, which nearly always ran over. On June 21, 1962, after the jury requested a more extended day, the closing hour was supposed to be 3 p.m. (7399-400).

The jury never sat at night and seems to have sat beyond the closing hour for an extended time only once. That was for forty minutes (18272).

Using the trial court's statistics, we estimate that after the testimony began in the case, there was an average of one-and-a half hours' testimony taken a day including testimony in ancillary proceedings and not counting the interruptions caused by minor colloquy and thousands of objections.

This concededly short schedule and the many delays caused by "unavoidable" incidents such as a juror's illness might not have been so bad and might have helped counsel in view of the lack of pre-trial disclosures if only the time that was not being spent before the jury were free or put to some good office. There were many good uses that could have been made of that time. *See Handbook of Recommended Procedures for Protracted Cases*, 25 F. R. D. 351 (1960). We suggest that, perhaps, the pre-marked

exhibits or any documents of true substance might have been turned over in advance; Jencks Act material for witnesses might have been given in advance; examinations under the Jencks Act might have been taken for groups of witnesses without extended colloquy; or counsel might have been allowed to go to their offices to prepare for their cross-examination or to prepare to meet issues not mentioned in the pleadings. But the statistics tell the story. This case was "colloquized", with the aid of no pre-trial discovery whatsoever, from the estimated six weeks to eight weeks to eleven months and one week. The Court of Appeals noted that the jury was subjected to four months of enforced attendance at a debating contest (330 F. 2d at p. 330).

The Court of Appeals, however, was kind to the trial court. It placed the blame "if blame there be" in equal parts upon the court and all counsel. But the Court of Appeals did not recognize what the trial court itself recognized: the responsibility for what happened rested with the trial court, the one person in the courtroom who could control colloquy.

The trial court was aware that it had the responsibility to "speed up" the trial and once threatened to "sit late at night and start early in the morning" (1337). The trial court recognized that control of colloquy was its responsibility (*e.g.*, 3587). It also recognized that the attorneys on *both* sides were under duty to protect their clients' interests and that duty was to argue every point of evidence that they felt the court would hear when they sought either to exclude evidence or have evidence admitted (21827).

The trial court also realized from time to time that something was amiss, sometimes feeling that it could do something about it and at other times feeling that the

situation was beyond control. For example, when the trial was some weeks afoot, it said:

> "I am very anxious to speed up this trial, though I must admit my hopes have been dashed time and again by unavoidably protracted colloquy, arguments, etc. and that is not said by way of criticism of anybody" (2011-11a).

Many months later the trial court was to observe:

> "We are losing so much time and have lost so much time with arguments and colloquy that the whole momentum of the case is being de-accelerated. I feel that with the short schedule that we have, the fact that there are these ostensibly unavoidable colloquies, sidebar conferences and arguments and now particularly, with a reduced reservoir of jurors time is really becoming of the essence" (15208-09).

The court, of course, had missed its opportunity at pretrial to speed up the trial. As the statistics and the nature of the colloquy show, it missed its opportunity right along by talking, inviting talk and talking some more. Most significant, most of that talk was totally avoidable—by a proper pretrial disclosure and by simple restraint by the trial court.

The colloquy ranged from discussions of rules of evidence (with copious citations by the trial court) to the campaign duties of Robert Morgenthau, who ran unsuccessfully for the governorship of New York State while this trial lagged on. It included dissertations by the trial court on the law, including some very elemental discussions. Most of the talk was unnecessary in whole; all of it was unnecessary in part. The trial court seemed not to be able to make a ruling on evidence when the prosecution or defense counsel objected

without placing its opinion in the record, sometimes with the avowed view of making it clear to a higher court that it was right and lest a higher court think there was reversible error in the record (*e.g.*, 4913-16, 18886).

There were other reasons for delay, besides colloquy in and of itself; although all of these other facts provoked the colloquy. There were sicknesses that took away weeks of time before the jury; but the longer the trial went, of course, the more sicknesses there would be. Time was wasted during those "incidents," as the prosecution observed, with colloquy (18393). Then there was the lack of pre-trial discovery, with resulting surprises, requests for discovery and subpoenas on the fly (*e.g.*, 959-61, 1601-16, 1803-13, 2012-01, 3964-81, 4184-201, 18,315), and the need to study documents not revealed before or revealed but a short time in advance of an offer (*e.g.*, 1363-72a, 1447-53, 2012-42, 4306-11, 4549-72, 7595, 9354, 15194-97).

The long trial with its avoidable "goes and long stops" was prejudicial to Mr. Darch and the other appellants here, and the trial court was aware that such a trial would be when it denied all pre-trial discovery (29408).

We submit that this case should have been reversed (i) because of that prejudice; and (ii) because the orderly administration of justice in the district courts requires that there ought not to be a precedent on the books like this one, which would be an invitation for complete and arbitrary disregard of sensible procedures in violation of elementary notions of fair play. If this case is not reversed for mismanagement, no case ever will be.

The duty of the jury in this case, even with their attention properly concentrated, was a frightening one. They had to understand complicated SEC laws and regulations; they had to compartmentalize in their minds evidence that

were sometimes binding on one set of defendants and not on others; they had to follow the prosecution through an unnecessarily involved explanation of Bon Ami and the like (but not be blinded by that testimony into not focusing on this case); they had to remember the testimony of scores of witnesses. Such a task required a concentration that is at best "a fiction," one we accept as part of our judicial system with reluctance. See *Krulewitch* v. *United States*, 336 U. S. 440, 453 (1949); *Blumenthal* v. *United States*, 332 U. S. 539, 559 (1947); *United States* v. *Crosby*, 294 F. 2d 928 (2d Cir. 1961); *United States* v. *Bufalino*, 285 F. 2d 408, 416 (2d Cir. 1960). That task was complicated even further by instructions that pleas after pleas of guilty by some defendants had to be erased magically from the jurors' minds, by headlines, by statements of a marshal in praise of Guterma and by the avoidable and "unavoidable" incidents that dogged this trial. The jury's task required, at minimum, a concentration of the highest order and by persons of genius calibre.

In this trial that necessary concentration was fractured by colloquy daily and by delays of weeks; it was fractured by the fact that the jury spent more time waiting to hear evidence than it did hearing evidence, by the annoyances of delay and by economic and social pressures. If we must abide by legal fictions, we submit that there must be some semblance of underlying fairness; there must be some basis to say that the "jury's view of the evidence controls." There is none here.

After a time, even for counsel armed with the record, the facts and witnesses become blended as the colloquy intrudes; it is hard even for us to pick out the distinctions made by *Guterma*, for example, among defendants. The jury did not have the written record; for weeks, it lost the thread and daily had to wait to pick up the thread as

they sat in the courthouse. Was it possible for the jury to understand, for example, that Ehrich's testimony given in October and November, 1962, was significantly different from and contradictory to Guterma's given between March and April of 1962? Could the jurors understand that Branfi's testimony, given in August and September, 1962 was inconsistent with the story that Guterma told some 5½ to 6 months earlier?

Beyond the obvious inability of the jury to grasp what was going on with its concentration so fractured is the fact that in this case the jury unquestionably was under strong economic and social pressures to see this case concluded; it was bound to be resentful of delays and so disturbed that its concentration was further disturbed; it was bound to feel that somehow their long stint should result in a verdict against one or more defendants no matter what.

There is no need to guess at all this, as the Court of Appeals pointed out.

The prosecution and the trial court led the jury into thinking this trial would last six weeks to two months, and after that we see in the record unambiguous statements that establish the jury's restlessness. The pressures on the jurors mounted, as this trial took nearly a year out of their lives and as they sat in the box or more often in the jury room waiting instead of tending to their businesses, going on vacations, and fulfilling the social appointments of their daily lives. There is no question that the jury was concerned about this matter of a long-trial-made-longer and the dashing of their expectations. We cite some examples.

On April 10, 1962, an employer of one of the jurors inquired of the trial court how long its employee would be at the work of listening (and not listening) to the case. The trial court estimated that it would take two more months; that was just its estimate (2866).

Guterma was still on the stand on May 2, 1962. During one of the numerous side-bar conferences that marked this "early" stage of the trial, one of the alternate jurors leaned over to the deputy marshal who was taking care of Guterma and asked the deputy marshal how long the case was going to take (4471-73). On May 28, 1962, another juror spoke to the same deputy marshal and told him in an elevator that she was quite "relieved" that Guterma was off the stand (6019-20). All the while and from time to time, the trial court had been apologizing to the jury for the many interruptions (*e.g.*, 7180-81).

And then the court went on its short schedule. This short session, coupled with the continuous "goes and long stops" of the trial, troubled the jury; and the jury on June 21, 1962, made its worries felt. It requested an extra hour a day. The foreman of the jury said to the court:

> "*Your Honor, we have been discussing trying to hasten this case*, and the consensus of opinion among the jurors has been if it is at all possible we can stay until 3:00 o'clock every day, if it is agreeable with everyone." (7398-99; emphasis added.)

The foreman reiterated that the jury had been discussing the matter among themselves and added:

> "My prime concern, your Honor, is the fact that I have to get back to my work as quickly as possible. I am not [*sic*] employed at the moment although I have a leave of absence from my employer for the duration." (7399)

Juror No. 3 voiced his concern:

> "I must return to earn a living for my family, *so these delays will make things worse*. I am very concerned with that." (7399; emphasis added.)

Juror No. 3 asked to be excused and was, but the court told the jury it did not want any mass exodus (7632).

As summer drew near, there was the question of taking a week's vacation. Juror No. 6 had planned a vacation with her family; she had made arrangements to go for a trip to Canada. All counsel seemed to be in agreement that a vacation would be in order; and the court wanted one, too. But the jury was against it; the jury wanted an end of the trial and Juror No. 6 accepted the will of her fellows (7523-24).

Into the summer the trial went. On July 10, 1962, the foreman of the jury informed the court that his employer was asking questions and he was concerned. He asked the court how much longer the case would take. The trial court said at least another month (9202-02a).

On September 13, 1962, it became necessary to excuse Juror No. 2, who was going to be operated on (15198-210).

And all the while the court was aware that the trial had bogged down and time was being "wasted" (9237).

While we feel the inability for concentration is in itself ample prejudice, we do not have to guess who suffered from the resentment at the time wasted. The prosecution made certain of it. The prosecution was well aware that it was important to have the delays shouldered by defendants. In summation, the prosecutor, in the context of commenting on the fact that the prosecution did not call two witnesses, told the jury that the defendants might want delay "for some reason." Here are two excerpts from the summation:

> "Well, the government did not feel it had to bring in Lehrich and spend so much time when his testimony would be merely cumulative, and the same thing is true of Eveleigh because their strategy was there." (25551)

> "They might want this case to go on and on, for whatever reasons they have, but the government has a duty and the government knew that charges would be made when it decided not to call witnesses, these witnesses being merely cumulative * * * " (25551-52)

And the lack of pre-trial discovery contributed to the jury resentment. The jury watched defendants' counsel pouring over documents, studying them in the courtroom and watched them put their questions and cross examination on documents under pressure (*e.g.*, 7381, 7595, 9354, 15494-96, 18315-16). They had visible evidence of time consumption, but little notion of the court's role in talking and encouraging talk and its duties.

In sum, Mr. Dardi was prejudiced by the unreasonable length of trial caused primarily by colloquy and to some extent the lack of pretrial disclosure of documents. The Court of Appeals' decision constitutes, in its inconsistencies, a sanction in effect of unnecessarily long trials. Under the circumstances, Mr. Dardi was denied the right to due process under the Fifth Amendment and the entire proceedings violated the evolving notion of fair play in the Federal system as laid down by this Court.

3

The restrictions imposed by the trial court on the cross-examination of the witness Lehrich constituted (i) a denial of the right of cross-examination and thus of due process of law and (ii) an abuse of discretion under the federal rule of scope of cross-examination; the Court of Appeals ignored the law of conspiracy that made the "usual" rule of scope of cross-examination inapplicable and has set a seriously erroneous precedent.

The prosecution chose to name Hyman Lehrich a co-conspirator but not a defendant in the indictment. On its direct case the prosecution offered Lehrich as a witness but "limited" his oral testimony to the highly inflammatory Bender affair (pp. 25, 27-28, *supra*). Then the prosecution argued that defense counsel should not have the right to cross-examine Lehrich on the events occurring in 1955 and 1956 because of the "limited" nature of the direct examination, even though Lehrich testified to a memorandum he had written describing events of United Dye in 1955 and gave it to Bender. The trial court and the Court of Appeals upheld the prosecution on the "federal rule of scope of cross-examination."

We submit that the restriction on cross-examination of Lehrich, the lawyer-architect of the conspiracy, constituted a denial of due process in view of laws of conspiracy. It was, in any case, an abuse of discretion in view of (i) the role played by Lehrich in the events, (ii) Lehrich's statements and actions attributed to him by other witnesses and (iii) the prosecutor's later statements. Lehrich's testimony was cumulative.

Because Lehrich was a co-conspirator, the prosecution, under the rules of law applicable to conspiracy, introduced

extensive evidence of statements made, conversations had, and acts performed by Lehrich in the years 1955 and 1956 through the witness Guterma and others, from which the jury might find a conspiracy. His statements and acts were in the record and they became binding on Mr. Dardi. See *Krulewitch* v. *United States*, 336 U. S. 440 (1949); *Lutwak* v. *United States*, 344 U. S. 604 (1953).

Lehrich's role in the alleged conspiracy was, of course, vital. For example, it was he who told Guterma to reduce his Handridge holdings (818-20); who prepared the alleged false proxy material (*ibid.*); who told Garfield and Pasternak that they would have to reduce their holdings of United Dye below 10% in order to sell the stock obtained from the merger; who arranged for the sale to alleged nominees of 75,000 shares of Handridge (879-80). Lehrich even attended the Guterma-Garfield-Pasternak discussions in Christmas of 1955 (921). And if we are to accept the prosecution's notions and the trial court's charge concerning Bon Ami being an "essential step," Lehrich was there, too; he was escrow agent for Garfield in the loan made by Bon Ami (Gov. Exh. 20; 1439).

Yet, with the witness Lehrich on the stand, the trial court refused to permit defense counsel to cross-examine Lehrich on the statements made by him, the acts performed by him and his conversations with others in the years 1955 and 1956. It and the Court of Appeals ignored the fact that these acts, statements and conversations were already introduced on the prosecution's case. They ignored the charge that was to be given and given that the jury was entitled to use Lehrich's statements and acts to establish the alleged conspiracy and, if the jury found one, were binding for all purposes on those found to be in the conspiracy. *Clune* v. *United States*, 159 U. S. 590, 593 (1895); *Lutwak* v. *United States*, *supra* at p. 617.

It is truly extraordinary that the prosecution could name Lehrich as a co-conspirator and not a defendant, bring before the jury his acts and declarations, put him on the stand, and then successfully object to cross-examination on those very acts and statements. We submit that this was a flat deprivation of the right of cross-examination; it cannot be due process of law; it is a fundamental violation of even the minimal rights of a defendant in a conspiracy case. *Cf. Delli Paoli* v. *United States*, 352 U. S. 232, 239-40 (1957); *Fiswick* v. *United States*, 329 U. S. 211 (1946); *Glasser* v. *United States*, 315 U. S. 60, 74-5 (1942); *Diaz* v. *United States*, 223 U. S. 442, 450-1 (1912); *Delaney* v. *United States*, 263 U. S. 586, 590 (1924); see also *Lutwak* v. *United States*, *supra* at p. 617.

Assuming that there were any discretion in this matter despite the law of conspiracy, we submit that the trial court abused that discretion.

The rule confining the scope of cross-examination in the federal courts to the scope of direct examination is not automatic; it is a discretionary one that must not be abused. See *United States* v. *Minuse*, 142 F. 2d 388 (2d Cir. 1944); *United States* v. *Quinn*, 124 F. 2d 378 (2d Cir. 1941). We submit on its face that no more flagrant abuse could there be than allowing this man, a key figure and a co-conspirator, to escape the stand without being tested in the fire of cross-examination.

Whatever doubt there could be about this—and we can see none—was eliminated when the prosecution time and again told the jury that the testimony of Lehrich in the excluded area would have been cumulative and when the trial court supported the assertion with its charge on "equally available witnesses" (25546, 25548, 2551-52).

We note that the Court of Appeals was mistaken concerning the fact that the trial court said that if Lehrich was called "as part of the defense case, he would be examined on the events of 1955 and 1956 as a hostile witness (330 F. 2d at p. 333)." In point of fact, while the trial court did indicate that it would probably allow Lehrich to be impeached it never said that Lehrich would be considered a "hostile witness" and that it would allow leading questions to be put to him if he was called by the defense (18451, 18619-41). Indeed, the prosecution argued for pages that no such advance ruling could be made and there was a difference between allowing impeaching questions and leading questions (18619-25). The prosecution submitted a ten-page memorandum in support of its position and was successful in keeping the court from ruling that Lehrich would be treated as a hostile witness and leading questions put to him.

We urge this Court, in sum, to hear us on this point and eventually make it clear that the rule of law, under the l. of conspiracy, has to be that a person who takes the stand and has had his statements and actions testified to can be questioned on those statements and actions on cross-examination.

4

As the Court of Appeals recognized, it was error for the prosecutor to state in summation several times that the witness Lehrich and the co-conspirator Eveleigh would have testified cumulatively to Guterma had they been asked proper questions by the prosecution, for, in effect, the prosecutor was testifying to his personal knowledge; but the Court of Appeals set out an erroneous vague rule of reversible error that, we submit, this Court should overturn.

The prosecution opened its summation by a ten-page recital in which it flatly told the jury that Lehrich and Eveleigh, who were, according to Guterma, chief plotters with him, would have testified cumulatively for the prosecution. According to the prosecution, they would have testified cumulatively on every phase of the prosecution's case, for they were involved in every phase of that case.

What the prosecutor did was error: for the jury could have understood it only to have come from the personal knowledge of the prosecutor from government reports and from Lehrich's grand jury testimony. The Court of Appeals recognized that the prosecutor erred and that the comments of some counsel—not Mr. Dardi's counsel—provided no excuse.

The Court of Appeals justified its finding on a strange and blanket statement: "However, here the jury had adequate affirmative testimony to support its verdicts and the prosecutor's comments under the circumstances do not constitute reversible error (330 F. 2d at p. 334)."

First, we shall show that the Court of Appeals was right in its view that the prosecutor had committed an error—an affirmative and deliberate error.

Second, we shall show that the error was prejudicial and that the Court of Appeals was wrong in establishing its blanket rule on reversible error when dealing with affirmative misconduct.

Lehrich and Eveleigh were named as co-conspirators in the indictment but not made defendants. If the testimony of Guterma is to be believed, they were in the heart of the conspiracy (or conspiracies), with Lehrich as the legal architect.

Lehrich was called as a witness by the prosecution to testify on the Bender episode and that alone; Eveleigh was not called at all. Most of the other central figures never testified: Garfield, Pasternak, Roen and Swann.

The prosecution was not unaware that the jury might wonder why some of the key figures to the alleged conspiracy, who were available to the prosecution, were not called to testify. Defense counsel in their summation alluded to the prosecutor's failure to call some witnesses. In attempting to extricate the prosecution from the problem, the prosecutor violated basic obligations of fairness.

The prosecutor, not without reason, focused his argument with respect to calling *missing* witnesses on Lehrich (25546). The prosecutor set out to tell in every way he could that not only was there no inference to be drawn against the prosecution, but that Lehrich and also Eveleigh would in fact corroborate Guterma and give cumulative evidence.

First, the prosecutor did it by deliberately misstating the defense arguments about missing witnesses. After referring to one defense counsel's comments on the prosecution's failure to call Lehrich and Eveleigh, the prosecutor said (25546):

> "Based on that [counsel's argument], therefore, if the government called them it would be merely corroborative, merely cumulative."

The prosecutor knew that defense counsel were not claiming that the missing witnesses would corroborate the prosecutor's case. Indeed, the prosecutor was to say so a few minutes later.

Immediately, the prosecutor incorporated a flat statement that Lehrich would corroborate Gutenma in a so-called "rule of law." This is the prosecutor's extraordinary statement (25546).

> "There is a rule of law which I believe His Honor will instruct you on because it is the law of this Circuit, that if a witness is available to both sides *and his testimony is merely basically cumulative* then there is no inference to be obtained from *the fact that the party for whom his testimony would be merely cumulative* was not called by him." (25546, emphasis added.)

Next, the prosecutor misstated an argument of Mr. Dardi's counsel about Lehrich, so that he could answer, "It would be cumulative" (25548).

Then, the prosecutor left no doubt as to his meaning. He left no doubt that he was saying *he knew* what Lehrich and Eveleigh would testify to (25551):

> "Well, the government did not feel it had to bring in Lehrich and spend so much time when *his testimony would be merely cumulative*, and the same thing is true of Eveleigh because their strategy was there." (Emphasis added.)

So that its impact would not be lost, the prosecutor went to the point two more times. He stated (25551-52):

"They might want this case to go on and on, for whatever reasons they have, but the government has a duty and the government knew that charges would be made when it decided not to call witnesses, *these witnesses being merely cumulative* * * *.

"It is my duty, the government's duty, to present as much evidence as is necessary to decide the case without spending time on *cumulative evidence* which is available to defense counsel if they want to bring it in." (Emphasis added.)

The gist of the prosecutor's "testimony" that Lehrich and Eveleigh would corroborate the prosecution's case was a representation that he had personal knowledge that they would. This was all the jury could think.

As to Lehrich, there was dramatic evidence that it had to be the prosecutor's knowledge that was the source of the divination that Lehrich's testimony would in fact be cumulative. Lehrich had testified repeatedly that he had been interviewed by the prosecutor in the case and many other Government agents more than "a dozen times" (18470-71, 19041-43). Moreover, the jury knew that he had testified before grand juries (19183, 19187). Thus, the jury would understand that the prosecutor's statements about corroboration were not only based on his personal knowledge of the facts but on Lehrich's numerous statements to Government officials and testimony before one or more grand juries.

The unfairness of it all is reinforced by the fact that the prosecution intentionally limiting Lehrich's evidence to the Bender episode, although it did not hesitate to put many witnesses on the stand to corroborate Guterma and spell out all the intricacies of the most tangential transactions. Then, the prosecutor vigorously and successfully contended out of the presence of the jury that defense coun-

sel should not be permitted to cross examine Lehrich on the facts occurring in 1955 and 1956.

So defendants found the prosecution restricting them from finding out the truth and then heard him tell the jury that this man would give "cumulative" testimony.

A statement of personal knowledge by the prosecutor of a fact on a key witness or witnesses—however entwined in facetious legal arguments—is error. *Berger* v. *United States*, 295 U. S. 78 (1935); *Wagner* v. *United States*, 263 F. 2d 877 (5th Cir. 1959); *People* v. *Tassiello*, 300 N. Y. 425 (1950).

The importance of the "missing" witnesses for the prosecution is acknowledged by the fact that the prosecutor chose to highlight these men, who are at the heart of the conspiracy with Guterma, as the first subject matter of his summation. He deemed this issue of paramount concern.

The Court of Appeals was in its conclusion, and its decision provides no set of criteria for reversible error. It runs away from analysis. When dealing with affirmative misconduct, we submit that this Court ought to require analysis and end blanket assertions—especially current in long trials—of no prejudice because there was sufficient evidence for the jury to find guilt.

When in the area of deliberate actions and misconduct, we urge that this Court say, as is the fact, that no one can evaluate the prejudice arising from the error. When that is wrong then that should be conclusive of the significance of the error. This should be the rule of law in order to create affirmative guides and to prevent the callous attitude towards deliberate error that exists in long cases. We urge this Court to exercise the means that it has to prevent prosecutors from violating traditions of fair play

by taking away the fruits of it—without measuring the unmeasurable, the quantum of prejudice. See *Mapp* v. *Ohio*, 367 U. S. 643, 657-69 (1961); *Miller* v. *United States*, 357 U. S. 301, 313 (1958).

5

The prosecution committed an act of misconduct when it brought a future prosecution witness before a grand jury during the course of the trial for the purpose, at least in part, of trying to gather evidence for use at trial; the Court of Appeals and the District Court erred in applying a subjective test to the conduct of the prosecutor in going beyond the scope of legitimate inquiry and set out a rule that permits prosecutors to aid current prosecutions by misuse of grand jury process.

In the midst of this trial, the prosecution subpoenaed Alexander Timm, the former personal secretary to Mr. Dardi and an officer and director of United Dye, to appear before the grand jury. The ostensible sole purpose was to give nothing but testimony "in a Grand Jury investigation of a possible conspiracy to obstruct justice in violation of Title 18 United States Code Section 371" (28614).

In fact, as the record will bear out, this procedure was used in part to gather or try to gather valuable evidence and to put pressure on Mr. Timm to give leads and information to the prosecution for use in this trial in violation of the rules of fair play in criminal trials in the federal courts. Mr. Timm testified at Mr. Dardi's trial as a prosecution witness only two weeks after being called before the grand jury and the prosecution did benefit from his testimony.

On May 16, 1962, the prosecutor put a statement on the record concerning his difficulty in obtaining records of Szabo Food Inc., the successor to United Dye, since the trial of the case began.

His story was this: He had a conversation with a Mr. Geraldson, the attorney for Szabo, in New York in the week of May 7th, during which he attempted to resolve difficulties with regard to subpoenaing and identifying the records of United Dye (5354). While in the prosecutor's office, Mr. Geraldson telephoned Mr. Timm in San Francisco, California. "Pursuant to the prosecutor's request", Mr. Geraldson "instructed" Mr. Timm by telephone to come to the prosecutor's office "pursuant to subpoena" covering the corporation, but not on Mr. Timm, and to be in the court house on Friday, May 11, 1963 (5354-55).

The prosecutor said that Mr. Geraldson appeared at the office on Friday, but not Mr. Timm (5355).

The prosecutor then represented:

> "It has subsequently developed that almost immediately after Mr. Geraldson's direction was given to Mr. Timm Mr. Timm spoke on the telephone to the defendant Dardi and Timm made no arrangements to come here on Friday, but then on Saturday the defendant Dardi flew out to California and conferred with Mr. Timm, who is, pursuant to the subpoena served on Szabo, a witness subpoenaed by the Government, and on Monday, Mr. Timm finally came to New York" (5355).

There was a sinister implication, but no direct accusation. The prosecutor was then asked whether he knew what Mr. Dardi had said to Mr. Timm, and he replied that he had no *personal* knowledge (5356).

The prosecutor said that he was making this statement in "all candor to the court". The prosecutor said: "I think it should be on the record, and so that no one can claim that the Government is keeping *anything* from the Court or defense counsel in this regard" (5355, emphasis added).

The fact of the matter is that the prosecutor did keep something from the court and from defense counsel: He had already, the day before, called Mr. Timm before a grand jury (28620, 5409-10).

Defense counsel investigated and discovered that Mr. Timm had been called before a grand jury (5408-09). Mr. Dardi's counsel made a motion for a mistrial and asked that all leads and evidence obtained from Mr. Timm be suppressed (5415-18). Mr. Dardi's counsel filed an affidavit of Mr. Timm in support of the motion (28620-21).

In the affidavit Mr. Timm stated that on May 15, 1962, he appeared in the court house and was told to accompany the prosecutor here to the grand jury then sitting on the 14th floor. He was called and testified before the grand jury. According to his recollection he testified to the following subjects among other subjects that could have nothing to do with a possible obstruction of justice since the trial began:

> (1) identification of purported telephone transcripts to which one Fabian Mayers, a co-conspirator in the case, was allegedly a party [Fabian Mayers was supposedly involved with Mr. Dardi and Brann in 1956]; (2) the purported passing of messages dealing with the transfer of funds to banks for the accounts of Louis Levin [Guterma's emissary to Brann in 1956] or Brann; (3) the relationship between United Dye and/or Mr. Dardi to Brann with respect to telephone

calls and transfers of money; (4) the relationship of United Dye and/or Mr. Dardi to Louis Levin with respect to telephone calls and bank accounts; and (5) the relationship of United Dye and/or Mr. Dardi to Fabian Mayers and the opening of bank accounts and telephone calls (28620-21).

The prosecutor filed an affidavit in opposition and admitted that Mr. Timm appeared in the prosecutor's office on Tuesday, May 15, 1962. He repeated the story he had told at first to the court, but added the fact that he had called Mr. Timm before a grand jury. He went into the story about Mr. Geraldson's "instructions" to Mr. Timm (28614-15). He claimed that he called Mr. Timm solely as a witness in an investigation of possible obstruction of justice (28614-16).

Then the prosecutor concluded that all the questions posed to Mr. Timm were framed with the grand jury investigation in mind:

> "Based upon these facts and the attitude then shown by Mr. Timm, the government concluded that the Grand Jury investigation was warranted. All questions posed to him during his Grand Jury appearance were framed with this purpose in mind." (28616, emphasis added.)

Mr. Timm was apparently the sole witness called before the grand jury (which was a regular and not a special panel) in connection with its "investigation."

The trial court read the grand jury minutes, and then denied the motion of Mr. Dardi's counsel. The court dictated into the record its decision and its reasons (7229-36). In denying this motion, the court found that the prosecutor acted in "good faith and propriety" and found that the "dominant purpose" of the prosecution was legitimate.

However, the trial court's findings with respect to the contents of the minutes establishes impermissible conduct of the prosecutor. The court found that the 44-page transcript of testimony contained 300 questions and answers. Out of that total, 36 questions pertain to Fabian Mayers, 5 pertain to defendant Brann and 4 pertain to Louis Levin. "These 45 questions," according to the court, "do not seem, at least on their face to have any relationship to the question of compliance with subpoena duces tecum and the production of records of United Dye and Chemical Corporation" (7231).

The court found that the remaining questions represented "*in their aggregate*" an inquiry into the circumstances surrounding the ostensible obstruction-of-justice purpose of the *ad hoc* grand jury investigation (7231) (implying, perhaps, that there were other questions, in addition to the 45, that likewise seemed irrelevant, except when taken in the over-all context of the inquiry).

The court made no finding as to the number of pages covered by answers to the 45 questions beyond the scope of the investigation. The Court of Appeals appears not to have read the minutes, but relied solely on the district court's reading.

In any event, the findings by the trial court corroborate the affidavit of Mr. Timm to the effect that, in the course of his appearance before the grand jury, the prosecutor went into facts in aid of his prosecution.

The court concluded, utilizing a percentage analysis, that "85% of the questions put to Timm before the grand jury were relevant to a legitimate inquiry by that inquisitorial body" (7232). But 85% is not "*all*."

It is submitted that the trial court erred, as a matter of law, in denying the motion, in light of its own findings of

fact based upon its examination of the grand jury minutes and the circumstances attending the grand jury investigation.

We recognize that the grand jury is an inquisitorial body with whose investigations the courts are rightly hesitant to interfere; but the courts supervise grand juries and have "inherent power to prevent abuse of [their] process." *In re National Window Glass Workers*, 287 Fed. 219 (N. D. Ohio 1922); *United States* v. *Lipshitz*, 148 F. Supp. 774 (E. D. N. Y. 1957); *In re Black*, 47 F. 2d 542 (2d Cir. 1931) (sanctioning judicial intervention to prevent *in advance* abuse of process in connection with a grand jury inquiry); and all the cases cited by the trial court (72a-73a). It is improper and a violation of a fundamental concept of fairness and our prosecutive system to use a grand jury to prepare a case already pending. *Ibid.* See also *Norcross* v. *United States*, 209 Fed. 13 (9th Cir. 1913).

The district court missed the point when it searched for the dominant purpose or motive of the inquiry. And the Court of Appeals erred when it adopted this subjective test and the district court's findings. The trial court was not dealing with future events but past events. There was no question of looking for the dominant motive in order to see whether there would be a future abuse. There was simply no issue of the court interfering with the function of the grand jury in its *ad hoc* investigation. The issue was: *had* process been abused?

We do not know the actual content of the questions that numbered at least 45, but we do know that they related to facts and persons having key importance to Mr. Dardi in the trial then in progress. Indeed, the very fact that almost four dozen such questions were in fact asked is evidence that the prosecution found it valuable to pursue the lines of inquiry. There is no question that *a* purpose was and

became to have Mr. Timm give testimony helpful to the prosecution. The purpose of the 45 questions, and maybe more, is undeniable. The number of questions is only significant to establish the extent to which the prosecutor abused his power and process.

This Court need not go into a fine examination of the workings of the human mind to reach the conclusion that the conduct was improper or was going to be improper. It is sufficient that here some time during the inquiry *a* purpose to question Mr. Timm before a grand jury was to collect information for the trial. See *United States* v. *O'Connor*, 118 F. Supp. 248 (D. Mass. 1953).

The amount of harm caused the defense by calling Mr. Dardi's close associate can never be known. The prosecution got Mr. Timm to testify; it may have gotten any number of leads. We submit that it is enough that Mr. Timm took the stand and identified documents in aid of the prosecution and there were very fundamental concepts violated. Here an error was committed by conduct which goes to the very roots of our judicial system. Such conduct dictates reversal and a new trial after the suppression of evidence or leads stemming from it. The only means we have to prevent prosecutors from violating our traditions of fair play is to take away the fruits of it; to allow these convictions here to stand is to "encourage disobedience". See *Mapp* v. *Ohio*, *supra*; *Miller* v. *United States*, *supra*. As one Court of Appeals has recently noted, under a different set of facts, but where the same principle was involved:

> "The Constitution of the United States, the statutes, the traditions of our law, the deep rooted preferences of our people speak clearly. * * * They * * * do not recognize the use of a grand jury subpoena, a process

of the District Court, as a compulsory administrative process of the United States Attorney's office." *Durbin v. United States*, 221 F. 2d 520, 522 (D. C. Cir. 1954).

The rule of the Court of Appeals of the Second Circuit, on the other hand, if left to stand, means that a prosecutor will be free to call people before grand juries to aid his prosecution so long as he can find an over-all excuse.

6

The decision of the Court of Appeals allowed impeachment of the defense's key witness by a question addressed to a supposed warrant of arrest; but the exception to the usual rule was not safeguarded by the procedures required by *Michelson* v. *United States*, 335 U. S. 469 (1947) and the rule established would permit prosecutors to impeach by questioning on supposed arrests without having documentation of that arrest.

Mr. Dardi called as his chief witness at trial Mr. Harold McCollom, who crossed the most damaging witness in the case against Mr. Dardi, the renegade defendant Brann. Mr. McCollom contradicted Brann on the accuracy of his facts and testified to Brann's bad reputation (see pp. 29-30, *supra*).

The District Court allowed the prosecutor to put a question that ordinarily is improper. The prosecutor asked Mr. McCollom whether there was a warrant for his arrest outstanding in Switzerland for embezzling of $50,000 (19977). The prosecutor claimed that this was a lead-in question to establish that Mr. McCollom was biased against Brann; for the prosecution claimed that it wished to show, through the witness, that Brann had been instrumental in getting the supposed warrant of arrest (19979-80). On several oc-

casions, defendants' counsel asked the trial court to direct the prosecutor to show some basis—even a telegram or a letter from the Swiss police—to back this claim. The trial court refused to require the prosecutor to show any documentary evidence or even to state orally his basis for his question; and to this day, we do not know whether there was any such basis (20044, 20046, 20047, 20055, 20065).

Our challenge in the Court of Appeals was not what that court's decision claimed it to be. We are not concerned with the fancied relevance of the supposed arrest. We were disturbed in the Court of Appeals, as was counsel in the District Court, over the fact that there is not a scrap of documentation to support the claim that there was a warrant of arrest outstanding against Mr. McCollom. We are disturbed that the prosecution in this case did not come forward with documentation.

This Court in *Michelson* v. *United States*, 335 U. S. 469 (1947) has laid down a method to handle impeachment by the supposed existence of an arrest record—lest "a groundless question" should "waft an unwarranted innuendo into the jury box." This Court adopted Professor Wigmore's requirement that there be (i) an offer of proof out of the hearing of the jury and (ii) the submission of documentary evidence of the supposed arrest. 335 U. S. at p. 481 n. Not to follow this procedure is error. See *Enriquez* v. *United States*, 293 F. 2d 788, 795 (9th Cir. 1961); see also *Clainos* v. *United States*, 163 F. 2d 593, 596 (D. C. Cir. 1947).

The Court of Appeals excused the prosecutor's conduct on the theory that the question was relevant to the witness' credibility by showing his hostility and bias (330 F. 2d at p. 336). We do not understand how the relevancy of the possible answer would take the arrest question here out

of the *Michelson* safeguards against unverified references to an arrest record. It would seem that the Court of Appeals is saying that the procedure of the *Michelson* case is confined to the specific setting of impeaching character witnesses. But it gives no reason why this should be.

We submit there is no reason: an unwarranted inference against the chief witness of a defendant, particularly when the defendant does not take the stand, can be crippling. It was here.

But again, in this case, the Court of Appeals swept aside, without analysis, the question of prejudice. In point of fact, the Court of Appeals' view that "it was not so prejudicial as to require reversal" runs contrary to the trial court's view of the importance of Mr. McCollom and this incident, which occurred near the end of the long trial and was one of the freshest events for the jury to consider. Here is what the trial court, which presided over the 49-week trial, said in connection with the incident:

> "The Court: Well, in view of the importance of this matter, and I recall the mistrial that was tried by Mr. Justice Pecora in the State Supreme Court on the first Jimmy Hines trial, I think that we ought to move very carefully in this particular area.
>
> "Mr. Walpin [the prosecutor]: Yes, your Honor."

A few pages earlier during colloquy about impeaching Brann by showing his reputation for truth and veracity, the trial court recognized the importance of Mr. McCollom and his testimony to the defense:

> "Now, in view of the fact that Mr. Walpin says that he has not had an opportunity to look into this, and in

view of the fact that I would like to read these authorities, and since this is a very important matter so far as the defense is concerned, *because Mr. McCollom has given important testimony for the defense, and in view of the fact that Brann gave very damaging testimony so far as Dardi is concerned, if Brann were to be believed*, I believe it is sufficiently important to the defense that before I rule on this question one way or the other, that the Court should have an opportunity to formulate its own opinion after reading [Mr. Dardi's trial counsel's] brief more carefully." (1953, emphasis added.)

We urge that this Court hear this case on this point—again to put an end to unanalyzed statements of "no prejudice" which are now the mode in large cases. We again urge that this Court recognize a difference between deliberate acts of the prosecution that are error and those that might stem from neglect or accident.

CONCLUSION

For the reasons stated above, and particularly since this case presents questions vital to the proper administration of federal criminal justice which should be settled by this Court, this petition for writ of certiorari should be granted.

Dated: New York, New York
June 8, 1964

Respectfully submitted,

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Attorney for Petitioner,
Virgil D. Dardi
575 Lexington Avenue
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Maurice N. Nessen
Of Counsel

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventeenth day of March, one thousand nine hundred and sixty-four.

Present:

HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. IRVING R. KAUFMAN,

Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

SAMUEL S. GARFIELD, *et al.*,

Defendants,

VIRGIL D. DARDI, CHARLES ROSENTHAL, ROBERT B. GRAVIS, CHARLES M. BERMAN,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO
Clerk

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 187—September Term, 1963.

(Argued December 5, 1963 Decided March 17, 1964.)

Docket No. 28030

UNITED STATES OF AMERICA,

Appellee,

—v.—

VIRGIL D. DARDI, ROBERT B. GRAVIS, CHARLES ROSENTHAL and CHARLES BERMAN,

Defendants-Appellants,

Before:

MOORE, FRIENDLY and KAUFMAN,

Circuit Judges.

Appeal by four defendants from judgments of the District Court for the Southern District of New York entered after a jury trial, William B. Herlands, *Judge*, convicting them of conspiracy to sell unregistered securities in violation of 15 U. S. C. §§77(e)(a), e(c), q(a) and X, 78i(a), j(b) and ff(a), 18 U. S. C. §1341, Rules and Regulations Promulgated by the Securities and Exchange Commission, and to defraud the United States by impeding the function of the Securities and Exchange Commission; convicting Dardi of substantive counts under 15 U. S. C. §§78i(a)(2), (a)(6) and ff(a) and 18 U. S. C. §2; and, convicting Gravis, Rosenthal and Berman of substantive counts under 15 U. S. C. §§77e(a)(1), 77x and 18 U. S. C. §2.

Affirmed.

FELDMAN, KRAMER, BAM & NESSEN, New York, N. Y. (Maurice N. Nessen and Merton Sarnoff, of counsel), *for appellant, Virgil D. Dardi.*

IRWIN L. GERMAISE, New York, N. Y. (Bernard B. Polak, of counsel and Phillip C. Samuels, on the brief), *for appellant, Robert B. Gravis.*

JOHN A. VASSALLO, New York, N. Y., *for appellant, Charles Rosenthal.*

GALLOP CLIMENKO & GOULD, New York, N. Y. (Milton S. Gould and Jonathan W. Lubell, of counsel), *for appellant, Charles Berman.*

GERALD WALPIN (Robert M. Morgenthau, United States Attorney for the Southern District of New York, Peter H. Morrison, Robert J. Geniesse and Gerald Abrams, Assistant United States Attorneys, of counsel), *for the United States of America.*

MOORE, *Circuit Judge*:

Four defendants, Virgil D. Dardi, Robert B. Gravis, Charles Rosenthal and Charles Berman, appeal from judgments of conviction that followed a jury verdict in which they were found guilty of unlawfully participating in the distribution of unregistered shares of United Dye and Chemical Corporation stock. Appellant Dardi was President and a Director of United Dye, a company long traded on the New York Stock Exchange. Appellants Berman, Gravis and Rosenthal were broker-dealers who dealt in the sale of stock in the over-the-counter market.

The Indictment

The indictment, which named thirty-three defendants and seventeen co-conspirators, contained thirty counts arranged in three general categories: Conspiracy (Count 1), market manipulation (Counts 2-5) and sale of unregistered securities (Counts 6-30). Because of severances and pleas of guilty, of the thirty-three defendants only the four appellants and one corporate defendant participated in the trial to its completion.[1]

Count 1 charged a conspiracy, 18 U. S. C. §371, by Dardi, Berman, Gravis, Rosenthal and others illegally to sell unregistered United Dye stock to the public in violation of specified sections of the Securities Act of 1933 (15 U. S. C. §§77e(a), 77e(c), 77q(a), 77x), the Securities Exchange Act of 1934 (15 U. S. C. §§78i(a), 78j(b) and 78ff(a)), Rules and Regulations promulgated under both acts by the Securities and Exchange Commission, the Mail Fraud Statute (18 U. S. C. §1341), and to defraud the United States by impeding the functions of the Securities and Exchange Commission (SEC). The methods used to obtain control of United Dye, the use made of other com-

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1 Prior to trial, the following defendants were severed: I. Vincent Powell, Michael Kramer, Murray Porter, Edward Stone, Vincent P. Barry, Oscar L. Gould, Jacob Klein, Albert Wood Moore, Garry Hochman, Robert Allen and Charles Landeau, all characterized by the Government as "salesmen." Defendants Louis Levin and G. F. Rothschild, Inc., were also severed prior to trial.

Four defendants entered pleas of guilty to portions of the indictment prior to trial: McGrath Securities Corporation (Counts 1, 6, 7, 8, 9, 17, 18 and 19); I. F. Stillman Inc. (Counts 1, 15, 27 and 28), Sidney Barkley (Count 1) and Irving Frank Stillman (Count 1).

Nine defendants pleaded guilty during trial: Samuel S. Garfield (Count 1); Allen K. Swann (Count 4); Allard Roen (Count 1); Herman W. Brann (Counts 4 and 5); Irving Pasternak (Counts 1, 6, 7, 8, 9, 20, 24, 27, 29 and 30); Garland L. Culpepper, Jr. (Counts 1 and 10); Rockwell Securities Corp. (Counts 1 and 10); Joseph Herbert Lederer (Count 1) and J. H. Lederer & Co. (Counts 1 and 30). Cornelius DeVroedt was severed due to illness; thereafter, Cornelius DeVroedt, Inc. entered a plea of *nolo contendere* to Counts 1, 24, 25 and 26.

panies such as Franklin County Coal Corporation and Handridge Oil Corporation, the illegal sale of unregistered stock and the illegal market manipulations were set forth in twelve detailed paragraphs and subparagraphs. The thirty-two overt acts alleged in the indictment included specific meetings and letters. Counts 2, 4 and 5 charged Dardi, Garfield, Pasternak and others with illegally pegging and stabilizing the price of United Dye stock on the New York Stock Exchange. In counts 6 through 30 the broker-dealers, Rosenthal, Berman, Gravis and others, were charged with the use of the mails in connection with specific sales of United Dye stock.

Each appellant was convicted on the first count. Dardi was convicted on each of three market manipulation counts under 15 U. S. C. §§78i(a)(2), (a)(6) and 78ff(a) and 18 U. S. C. §2. Berman, Gravis and Rosenthal were convicted on counts charging the illegal sale of unregistered United Dye stock in violation of 15 U. S. C. §77e(a)(1), 77x and 18 U. S. C. §2.[2]

I.

Outline of the Evidence

As an overture to an analysis of the many legal and factual grounds urged for reversal, it is necessary to describe in brief outline the factual background against which the case must be viewed. The Government's case was constructed principally on the testimony of Alexander L. Guterma, the Chairman of the Board of United Dye and the central figure in the complex chain of transactions which he described to the jury. The Government alleged, and the

2 The jury found Rosenthal not guilty on Count 15, Berman not guilty on Counts 14, 24, 25 and 26 and Gravis not guilty on Count 16. Defendant R. B. Gravis, Inc. was convicted on Counts 1 and 29, but found not guilty on Count 16.

jury must have found, the existence of a single multi-stage conspiracy which had as its central purpose distribution to the public of unregistered United Dye stock. In the preliminary stages of the scheme, the conspirators gained control of United Dye and created a corporation with which it was later merged, Handridge Oil Company. As a result of the Handridge-United Dye merger, the conspirators obtained 575,000 "control" shares of United Dye stock. Shortly thereafter, through manipulation of the market on the New York Stock Exchange and misleading and fraudulent statements to customers the shares were sold in the over-the-counter market without the registration required by the federal securities laws. A résumé of Guterma's testimony on direct examination supplies most of the details on which these ultimate facts were grounded.

Preparations for the Merger of United Dye and Handridge Oil

In June of 1955, Guterma joined defendants Samuel Garfield and Irving Pasternak in their efforts to acquire the Franklin County Coal Corporation. Guterma testified that his partnership with Garfield and Pasternak was for the purpose of merging Franklin, then owned by John and Clint Murchison, Jr., with a company listed on either the New York or American Stock Exchange and then selling the stock of the listed company as thus acquired. Franklin's two major assets, coal lands in Illinois, long inactive, and an oil pipeline in Wyoming, had been unable to muster a profitable return for several years. To effect the sale, Garfield and Pasternak gave their promissory note for $510,000 as the full purchase price, leaving the stock with the Murchisons as security. The only cash to change hands at this point was a loan of $800,000 from Garfield, Pasternak and

Guterma to Franklin to redeem a like amount in mortgage debt to the Murchisons.

Since the Franklin stock was pledged with the Murchisons, and would be unavailable for a merger with a more substantial corporation, Guterma, Garfield and Pasternak found it necessary to improvise on their original plan. To this end Swann, their attorney, formed Handridge Oil Corporation to which Garfield and Pasternak conveyed their interest in Franklin. In exchange, the 500,000 shares of Handridge were transferred to Swann, "in trust" for the three partners. Guterma testified, however, that subsequently much of the Handridge stock was held by nominees, to disguise Guterma's, Garfield's and Pasternak's status as "control persons" under the 1933 Securities Act.

Meanwhile, Guterma had become acquainted with Dardi, already an officer and director of United Dye, and in the latter part of June, 1955, had agreed to purchase a block of 38,500 shares of United Dye stock through Dardi at ten dollars per share. There were at this time about 168,000 shares of United Dye outstanding. Soon thereafter, Guterma distributed about two-thirds of the 38,500 shares as follows: Pasternak, for himself and Garfield, bought 12,000 shares; 1,000 shares each went to co-conspirators Robert Eveleigh, a Guterma aide, and Robert Leonhardt, owner of McGrath Securities Corporation, a defendant brokerage house which was later to sell United Dye shares; and Dardi retained an option, later exercised, to buy 6,500 shares to complement the 17,700 shares he already held. By early September, 1955, Guterma had been elected Chairman of the Board, Dardi President, Eveleigh Treasurer, and Alexander Timm, one of Dardi's associates, Assistant Secretary.

While Guterma was establishing himself at United Dye, he discussed with Dardi the prospects of a merger between United Dye and Franklin County Coal. A committee of

United Dye Directors, including Dardi, was appointed to look into the proposal. Originally, Guterma represented Franklin in the negotiations with the committee but when he became a director, he negotiated on behalf of United Dye with Pasternak and Swann. The proposed merger was also discussed with the Committee on Stock Lists of the New York Stock Exchange, which eventually granted United Dye's application to list the additional shares to be issued in the merger. In early December 1955, a merger agreement was executed under which United Dye was to issue 575,000 shares of its stock (then selling at approximately $30 per share) in exchange for the 575,000 shares of Handridge. Handridge was required to have at the closing, in addition to unencumbered Franklin shares, $750,000 in cash. Guterma testified that this $750,000 actually came from the sale of 75,000 Handridge shares to, among others, United Dye directors, including Dardi, who concealed their ownership through an escrow agent.

To Guterma the then inflated price of United Dye stock was not conducive to execution of the merger, and he discussed the situation with Dardi and Hyman Lehrich, also an officer and director of United Dye, as well as with Garfield and Pasternak in October 1955. To meet the problem without running afoul of the securities laws governing the sale of control stock, Guterma and Pasternak entered into a series of "loan" agreements with various "borrowers," in fact nominees, who immediately sold the "borrowed" stock reaping substantial profits in the process. The Government also adduced evidence that coincident with the sales of Guterma and Pasternak, Dardi through nominees disposed of the 6,500 shares he had purchased from Guterma under the June 1955 agreement. The cumulative effect of the sale of substantially the whole 38,500 share block achieved the desired result of driving the price of United Dye from a high of $38 per sh. e in November

1955 to approximately $16 on May 1, 1956 when the merger was to close.

Effectuation of the Merger of United Dye and Handridge

The merger agreement between United Dye and Handridge stipulated that Handridge was to own, at the date of the merger, the Franklin stock, then pledged with the Murchisons as security for Garfield and Pasternak's $510,000 note, free and clear. Garfield and Pasternak, according to Guterma, did not have the funds to pay off the note. Therefore, Guterma, Dardi, and Lehrich, in April 1956 caused the merger agreement to be modified to delete the free and clear requirement and to provide that United Dye would assume the note and that Garfield and Pasternak would pay United Dye $510,000 plus the $9,000 interest that had by then accrued.

Bon Ami

About this time Dardi learned that 63,000 shares of the Bon Ami Company, which had over $3,000,000 in liquid assets, were available for purchase. By May 1, 1956 Dardi had executed an agreement with certain Bon Ami stockholders which provided for United Dye's payment of $1,350,000 (to be borrowed from Guterma's F. L. Jacobs Corporation) and the delivery of its $350,000 promissory note in exchange for 63,000 Bon Ami shares.

Guterma testified that control of Bon Ami was acquired to enable Garfield and Pasternak to satisfy the $519,000 obligation owed by them to United Dye. Moreover, his testimony, as well as other evidence on this phase of the case, could well support the conclusion that the Bon Ami treasury after the merger was used to satisfy the obligations incurred by United Dye in the very process of

acquiring its 63,000 Bon Ami shares. To substantiate Guterma's testimony, the Government introduced evidence of various "loan" transactions involving Garfield and Pasternak and, as Directors of Bon Ami, Guterma and Dardi. Immediately after the merger, the Bon Ami Executive Committee formed a subsidiary, B. A. Royalties, Inc., which was used as a conduit for transferring $860,000 of Bon Ami funds to Garfield and Pasternak. Out of the $860,000 Garfield and Pasternak, by check back dated to May 1, 1956, paid $519,000 to United Dye in payment of their note to the Murchisons; and, at the same time, they transferred $140,000 to United Dye, purportedly as a loan. Subsequently, so that Bon Ami would be repaid, Bon Ami transferred to Diversified Oil & Mining Corporation (D. O. M.), recently organized and controlled by Guterma, Garfield and Pasternak, $1,250,000 in exchange for a similar amount in D. O. M. debentures secured by D. O. M.'s properties. The same day, D. O. M. transferred $915,000 to Garfield and Pasternak, purportedly in partial payment for oil properties, although those properties had been previously pledged to Bon Ami, and $250,000 to United Dye as a loan. From the $915,000 received from D. O. M., Garfield and Pasternak repaid the original $860,000 loan from Bon Ami. According to the Government, the final step in this series of transactions was the payment by United Dye of the obligations it had incurred in its purchase of Bon Ami, $1,700,000.

The Garfield and Pasternak Guarantee

Under the United Dye-Handridge merger agreement, Garfield and Pasternak had guaranteed that the Franklin pipeline would, for each of the years 1956 and 1957 receive a minimum profit before amortization and depreciation of $1,200,000. As security, Garfield and Pasternak pledged

85,000 United Dye shares they had received in the merger to United Dye. Less than two months after the merger, Guterma recommended to the United Dye Board that this guarantee be waived in return for a cash payment of $800,000. As it happened, according to Guterma, Garfield and Pasternak transferred to United Dye $450,000 in cash (obtained partially from United Dye and partially from D. O. M.) and 115,000 shares of D. O. M. stock, arbitrarily valued at $250,000 although actually worth only $184,000. In return, they obtained the 85,000 shares, then worth $1,200,000, which could be sold in the forthcoming distribution.

Sales to the Public of United Dye Shares Issued in the Merger

The third objective of the Guterma-Garfield-Pasternak partnership was the sale to the public of 500,000 shares of United Dye, amounting to more than 50 per cent of the stock outstanding, acquired in the May 1956 merger. To avoid the practical and legal difficulties attendant upon the sale of such a large block on the New York Stock Exchange, the three partners had agreed to sell the shares in the over-the-counter market. It was at this point, during the summer of 1956, that the broker-dealers commenced their operations. While the United Dye stock was being stabilized artificially on the Stock Exchange, the broker-dealers (enlisted by Guterma), primarily by way of hard-selling long distance telephone calls and misleading tout sheets (so-called "boiler room" tactics), sold the stock to the public, knowing that no registration statement had been filed. The firms involved, including I. F. Stillman, Inc. (appellant Rosenthal), R. B. Gravis, Inc. (appellant Gravis) and C. F. Rothschild & Company (appellant Berman) were to be paid a fifteen per cent commission plus one dollar in cash for each share sold.

Stabilizing the Market

The success of the telephone sales campaign depended in large measure on the price at which United Dye was being traded on the stock exchange. To maintain the price, the shares sold initially over-the-counter had to be absorbed when offered on the Exchange. Consequently, Guterma made the necessary "pegging" arrangements with his aid, Hughes, defendant Brann, appellant Rosenthal, and defendant Sidney Barkley, Rosenthal's associate in I. F. Stillman & Co.

Before the merger, Guterma had instructed Hughes to watch the market price and to purchase any large amounts of United Dye stock for which there was no demand. Hughes complied by opening several brokerage accounts and purchasing in the name of relatives, friends and nominees. Hughes' efforts proved inadequate, however, when the boiler room sales began in earnest. To alleviate the problem, Dardi introduced Guterma to Brann who had expressed an interest in selling United Dye shares in Europe and in North Africa where he owned a bank. Brann could take advantage of 30 per cent margin, insure the anonymity of anyone conducting a market stabilization program, and tout the stock in his bank's market letter. An arrangement was agreed upon wherein Brann was to buy United Dye stock on the New York Exchange, the margin coming from Guterma, and then to sell the stock abroad. Although the Brann arrangement eventually bogged down as a result of Brann's alleged double-dealing, the net result of the stabilizing efforts of Hughes, Brann, Rosenthal and Barkley proved successful.

The sales to the public and accompanying market manipulation, which lasted until early November 1956, completed the venture which Guterma, Garfield and Pasternak had undertaken a little over a year earlier, and in October they

met at Clare, Michigan to discuss dividing the spoils amongst themselves. In April 1957 Guterma resigned from United Dye and began to sell the 83,000 shares he then owned. Dardi, according to Guterma, learned of these sales and, after reminding Guterma of Guterma's agreement to give him first preference, purchased 40,000 shares from Guterma at the then market price of $7.

II.

Sufficiency of the Evidence

Because a large portion of the errors asserted by appellants are bottomed on disputed questions of fact and sufficiency of proof, it is appropriate to advert to certain long established principles of appellate review. A jury of twelve has heard all the testimony, explanations of the meaning of a vast number of exhibits, and the exhaustive summations of counsel, and has been instructed on the applicable legal rules. Their verdict, after due consideration, was that appellants were, on the facts and the law, guilty of substantive crimes and of conspiracy. It was within the exclusive domain of the jury to choose between competing inferences of fact, *United States* v. *Grunewald*, 233 F. 2d 556, 563 (2d Cir. 1956), rev'd on other grounds, 353 U. S. 391 (1957). On appeal the evidence must be considered in a light most favorable to the Government. *United States* v. *Turino*, 269 F. 2d 488, 490 (2d Cir. 1959). Moreover, microscopic dissection of bits and pieces of evidence when laid out in a cold record overlooks the truism that "logically the sum if often greater than the aggregate of the parts, and the cumulation of instances . . . may have probative force immensely greater than any one of them alone." *United States* v. *White*, 124 F. 2d 181, 185 (2d Cir. 1941).

Substantive Counts (the Broker-Dealers)

The broker-appellants' convictions stem from their unlawful sales of unregistered stock. They do not dispute that they sold the stock or that it was not registered; rather, they claim that they were ignorant that the stock required registration at all. Section 5(a) of the Securities Act of 1933, 15 U. S. C. §77e(a)[3] sets up a general prohibition on the sale of unregistered securities with certain exemptions.[3] No exemption is provided for an "underwriter" defined by the statute[4] as any person who offers or sells a security for an "issuer." An "issuer," in turn, is defined in terms of "control." Since the evidence clearly establishes that Guterma, Garfield and Pasternak were in "control," and since the broker-appellants sold for one or more such "issuers," each was an "underwriter" under the Act. See *United States* v. *Crosby*, 294 F. 2d 928, 939-40 (2d Cir. 1961),

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3 15 U. S. C. §77e(a) provides:

Prohibitions relating to interstate commerce and the mails.

(a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

4 15 U. S. C. §77b(11) states:

The term "underwriter" means any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in the direct or indirect underwriting of any such undertaking; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commission. As used in this paragraph the term "issuer" shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer.

cert. denied sub nom. Mittelman v. *United States*, 368 U. S. 984 (1962). Through this circuitous route it is apparent that the crucial issue as to the broker-dealers' guilt is whether they knew that they were selling for a "control" group. In *United States* v. *Crosby, supra*, this Court found that there was insufficient evidence that the broker-dealers "knew or should have known that they were 'underwriters' in terms of the Securities Act." The evidentiary problem here is whether the link missing in *Crosby* has been supplied.

Berman

Berman has energetically undertaken the task of explaining away all the undesirable inferences that can be drawn from the evidence adduced against him. A similarly meticulous analysis of various transactions and meetings was urged to the jury. We set out here a few of the facts from which the jury might have justifiably chosen to disregard Berman's explanations of his conduct. Berman came to Guterma and asked how many shares of United Dye were available and what the compensation was. He was told that about 150,000 shares "could be sort of held for him on an option basis." When Berman pressed for more, he was informed that any amount he could sell would be forthcoming and that "there was in excess of 200,000 to 250,000 available." When Berman asked of compensation, Guterma said that brokers were getting 15 per cent by check and $1 in cash per share. Guterma also told him that the stock should be sold for a specific amount—at the closing New York Stock Exchange price. There was also evidence tending to show that six "vendor" letters, addressed to Garfield, Pasternak, Swann and three others were all sent instead to Swann, with whom Berman dealt, and that these letters were a subterfuge. Perhaps even more damaging was Guterma's testimony that, when Berman expressed concern

about the drop in United Dye price, Guterma replied that all efforts were being made regarding market stabilization and that Berman should not be disturbed about it.

Berman argues that it was only logical to ask the chief executive of a corporation if large blocks of shares were available for sale; that in discussing market price with Guterma he hoped that as Chairman of the Board Guterma would influence the market through legitimate corporate actions; and that the only inference that can be drawn from the "vendor" letters is that copies were sent to Swann in his representative capacity. Whatever the various inferences it *might* have drawn, the jury heard Berman's explanation of his conduct and discredited it. The evidence presented describing the circumstances of Berman's participation in the distribution is sufficient to support the jury's conclusion that he knew that his sales were for a control group.

Berman also asserts his good faith reliance on legal opinions that the stock was tradeable without registration, as did the broker-dealers in *United States* v. *Crosby, supra.* The *Crosby* case makes it clear, however, that reliance on the opinion of counsel is but one consideration which may be persuasive in the jury's determination of the defendant's state of mind. Among other factors which the jury could consider as going to Berman's good faith reliance on legal advice was the fact that the letters expressing the opinion that the stock could be sold without registration specifically made the assumption that the sales were not being made for "control" persons. And, as pointed out, the jury could have inferred that when these opinions were rendered Berman knew that he was dealing with control persons.

Gravis

Gravis first expressed his interest in selling United Dye to Hughes, who arranged a meeting with Guterma. Guterma

told Gravis that the amount of available shares was in excess of one-half million, and assured him that these shares would not be sold on the Exchange so as to undercut the price. Guterma further informed Gravis that he could acquire shares for distribution, and that "the brokers" were receiving 15 per cent commission by check and $1 in cash. There was also evidence that Gravis was one of the brokers who sent periodic "confirmations" of sales to Hughes at United Dye. Finally there was evidence that Gravis made false statements to SEC Investigator Pitchardo from which the jury might have concluded that Gravis knew full well that his sales were unlawful and that Guterma was in a control position.

Rosenthal

Guterma's testimony alone provides a sufficient basis on which the jury could have decided that Rosenthal knew he was selling for Guterma and his control group. Guterma told Rosenthal that he (Guterma) and his "associates," Garfield, Pasternak, Swann and others, wanted to sell United Dye shares in the over-the-counter market. He further informed Rosenthal that the group controlled a total of approximately 550,000 shares and that "substantially all of these shares would be sold." In addition, testimony of Barkley, Rosenthal's former partner, was that he and Rosenthal had actively engaged in market "pegging" while the United Dye shares were being retailed, under Guterma's supervision.

The Conspiracy Count

The broker-appellants make the complaint that the Government failed to prove the single conspiracy alleged in Count 1; that the proof showed that any conspiracy to sell securities to the public was independent of a separate and

prior conspiracy involving the creation of the shares and their distribution to the co-conspirators and nominees. The prejudicial effect of the mass of evidence introduced as to the activities of Guterma and his "executive" group, it is argued requires reversal on the substantive counts as well as the conspiracy count.

As was recently said in *United States* v. *Crosby, supra*, at 945, "whether a scheme is one conspiracy or several is primarily a jury question, since it is a question of fact as to the nature of the agreement." In the case at bar the jury was so instructed.

There was abundant evidence to show the complicity of Guterma, Garfield and Pasternak, among others, in one plan consisting of a progression of carefully related transactions which had as its ultimate purpose the sale to the public of unregistered stock. Indeed, Guterma testified that this was precisely what his venture with Garfield and Pasternak was all about. But it is not fatal that the broker-appellants were not shown to have been aware of each part of the unlawful plan. See *United States* v. *Benjamin*, —— F. 2d —— (2d Cir. 1964); *United States* v. *Crosby, supra* at 945; *United States* v. *Agueci*, 310 F. 2d 817 (2d Cir. 1962), *cert. denied*, 372 U. S. 959 (1963). It is only necessary to show that appellants knew of the conspiracy and that they associated themselves with it. *United States* v. *Bentvena*, 319 F. 2d 916, 928 (2d Cir. 1963), *cert. denied*, 32 U. S. L. Week 3212 (U. S. Dec. 10, 1963), *United States* v. *Aviles*, 274 F. 2d 179 (2d Cir. 1959), *cert. denied, sub nom. Genovese* v. *United States*, 362 U. S. 974 (1960).

We must conclude that there was sufficient evidence from which the jury could find that the broker-appellants knew that Guterma represented a control group acting in concert for the purpose of selling to the public unregistered stock. Upon the facts here, the sufficiency of the proof on the conspiracy count is bolstered by the determination of

the adequacy of proof on the substantive count. See *United States* v. *Crosby, supra,* at 940.

III.

Conduct of the Trial

Dardi, apart from points dealing with claims of specific evidentiary errors, asserts that he was denied a fair trial (1) because of the trial court's failure to grant proper and timely pre-trial production of documents and a bill of particulars; (2) because of the extended duration of the trial and the court's toleration of "colloquy"; (3) because of the charge; and (4) because of unfair and discriminatory treatment by the trial court.[5]

Pre-Trial

Probably no experienced trial counsel has ever commenced a trial feeling that every necessary item had been fully and adequately prepared and that nothing remained to be done during the trial. If so, it is an experience enjoyed by very few. The usual pattern, particularly in the complicated and protracted case, is to spend most of the time after daily recess preparing for the morrow. And certain it is that trial counsel, if worthy of the title, never are satisfied that all possibilities of law and fact have been explored and that all the arguments essential to victory have been made. Limitations of time, space and the finite mind apply even to lawyers and it is against the background of this unfortunate but actual limitation that this trial must be viewed.

The indictment was filed on July 14, 1961. It was by no means in skeleton form. The conspiracy was alleged in detail and thirty-two overt acts were set forth. The par-

5. The other appellants join in these contentions.

ticular statutes claimed to have been violated were set forth. The nature of the conspiracy, namely, the sale of unregistered stock, the rigging of the market and the fraudulent sale to the public were alleged not in generalities but with reference to the specific means used for these purposes. The substantive counts dealing with market manipulation and sale were equally definite. Surely these appellants were adequately informed of the charges against them.

They complain, however, that they were not allowed sufficient pre-trial discovery and inspection and a detailed bill of particulars. In September 1961 defense counsel filed their motions for discovery and particulars. In December a single judge was appointed before whom all matters were to be heard. Early in February 1962 the court denied the motions. This denial, however, did not cut off the defense from information. On February 8, 1962 the Government served an eight-page bill of particulars and offered to make available some sixty-eight categories of documents. Pre-trial conferences were held during February with the not unusual result of the Government claiming that it was being over-liberal in its disclosures and the defense contending either that it was not enough or too much to be encompassed before the commencement of the trial. It was at this point that the trial court, faced with the necessity of commencing the trial at some time, made the suggestion that defense counsel could prepare as the case went along. No inference can be drawn from this remark that defense counsel approached the day of trial completely unprepared and that the trial court callously told them to prepare as they went along. They had been aware of the charges against their clients for some eight months. Their motions, the pre-trial conferences, the "minutiae" in the Government's bill of particulars, of which they now complain, all refute their present claim.

Even after the commencement of the trial (February 27, 1962) defense counsel had many opportunities for further preparation usually not afforded in the average trial. The Government's case was presented in substantial part through Guterma whose testimony commenced on March 9, 1962. A week's adjournment, caused by a defendant's illness, occurred between March 13th and 20th. The first occasion for cross-examination by any of appellant's counsel did not arise until April 16th. Investigation into each phase of his testimony surely could have been made in this interval.

Lastly and most determinative is the fact that Dardi makes no showing on this appeal that the facts would have been other or different had he had an additional year or six months in which to prepare. Nor does he point even now to any facts which could have been developed which would have so radically changed the fact picture that, in effect, a new trial should be granted.

The Duration of the Trial

All the evils attendant to a long trial (February 27, 1962 to January 31, 1963) are stressed by appellants; the possibility of the jury being unable to remember the testimony given in the earlier stages of the trial, the jury's impatience in being deprived of the opportunity to attend to their own affairs, their expressed resentment at short court sessions, abandonment of any summer vacation plans and their restlessness over the long periods involved in court-counsel colloquy.

There can be no scale by which to measure the proper length of a trial. See, e.g., *People* v. *Clemente*, 8 N. Y. 2d 1, 200 N. Y. S. 2d 625, 167 N. E. 2d 327, *cert. denied*, 364 U. S. 923 (1960). For the reasons specified and many others, long trials should be avoided. However, a multi-defendant

stock fraud case, as involved as this one, usually necessitates delving into many financial transactions. Those who participate in such transactions do not supply the government with a simple and clear picture. The picture, even as on a jig-saw puzzle, only comes into vision by the assembling of hundreds of curiously shaped parts, each piece seemingly having no identity until it is fitted into and made a part of the whole. Every defendant can claim and with much plausibility that his own role may have become besmirched by having been tried with others more guilty than he—and naturally every defendant feels that he is the least guilty, if guilty at all.

Two legal principles, however, must be honored. Those entrusted to make the laws have placed the crime of conspiracy on the books and it has not been repealed despite the fact that throughout the ages it has been largely responsible for multi-defendant trials and the admission of evidence otherwise inadmissible. Nor does any statute exist nor are there court decisions which declare a trial of more than one defendant at a time to be reversible error.

In any financial scheme of magnitude involving many persons and many companies it is but normal expectancy that there be many participants. If the Government honestly believes (and there is no proof here to the contrary) that many defendants have played a part in the conspiracy they may be—and probably should be—joined as defenants. Again a long-established legal principle contributes to this joinder, namely, that a defendant need not be a member of the conspiracy from its inception to its termination. Defendant co-conspirators in many instances need not even know their fellow conspirators or the particular part they are playing. If the indictment of the many original defendants contributed to the length of the trial, this fact does not constitute reversible error.

Colloquy

Appellants argue that they were deprived of a fair trial because of the extensive colloquy engaged in between court and counsel. They point to certain statistics, inserted in the record by the court itself, that after over eight months of trial the 19,544-page transcript contained 9,814 pages of recorded testimony, 892 pages related to ancillary matters and 8,838 pages devoted to colloquy—practically 50 per cent testimony, 50 per cent colloquy. The trial was eventually to consume over eleven months and the transcript to extend over 26,000 pages.

By definition, colloquy is mutual discourse. In any litigation, but particularly where many defendants and many counsel are assembled, colloquy is indeed mutual and can, unless controlled, become overly extensive. The Dardi brief contains a twenty-four page analysis of the subject matter of the more extended colloquies. Each topic was related to some point, substantive or procedural, which one or more counsel believed to be of importance to his cause. The trial court was undoubtedly motivated by a desire to obtain the correct answer and to give counsel the benefit of expressing their views. However, is the trial transcript the place to have recorded the extemporaneous legal philosophies of counsel, philosophies frequently tinged by the exigencies of the moment and the character of the testimony sought to be admitted or excluded? Would it not be better to insist that trial counsel insofar as possible be prepared to justify their positions in written memoranda submitted to the court? The myriad of legal points which could be conjured up by resourceful counsel, if debated on the record in a long and complicated case such as this, would result in a legal treatise not unlike a hypothetical *Corpus Juris Tertium*. Using the statistics submitted to us, since half of the record in eight months was devoted to matters other

than testimony, the jury was subjected to four months of enforced attendance at a debating contest. This is not to say that on occasion a brief statement of the grounds for objection or the reasons for the admission or exclusion of evidence may not be helpful to court and opponent but the dictation by counsel on the record of treatises tantamount to Law Review articles should be avoided.

Except for unduly protracting the trial, and we have already determined that length *per se* does not create reversible error, the colloquy itself does not disclose material of a prejudicial nature. Furthermore, the blame, if blame there be, must be shared by the court and all counsel. But this is not to say that a tighter rein by the Judge would not have resulted in a materially shorter trial. We have already said that the court has wide discretion in adopting methods which will expedite a trial and that there are occasions when it is wise for this discretion to be exercised. See *United States* v. *Agueci, supra,* at 841.

The Trial Court's Charge

1. Summation of Contentions

After an eleven months' trial, the trial court apparently believed that it would be of aid to the jury to summarize the facts. This summary occupied the first day of the two-day charge. Appellants attack the court's review of the parties' "contentions" as a distortion, more specifically, that they were not defendants' contentions but rather that "they were the prosecution's contentions of defense 'contentions.'" Only a careful analysis of the charge itself supplies the answer to the accusations that it was not impartial, that it was unfairly balanced, unfairly presented and unfairly emphasized or de-emphasized the positions of the defendants. To set forth any detailed refutation of these charges might well require a re-statement of the court's 450-page

charge. Any such procedure would only add needlessly to the ever-expanding law reports. The conclusion from this court's analysis is that the charge was fair and that no reversible error can be attributed to the trial court's review of the facts or "contentions."

2. Legal Errors in Charge

In addition to the attack on the trial judge's summary of "contentions" in the charge, appellants assert that the charge incorrectly stated the law in various respects. While specific sentences as excised from the overall context may have been unfortunate, we think it clear that when viewed in its entirety, the charge correctly stated the law.

Appellants claim that the trial court's instructions on the issue of appellants' guilty knowledge and criminal intent as to the substantive counts was tantamount to directing the jury to bring in a guilty verdict. They stress particularly the statement that in proving that a defendant acted knowingly and wilfully it was not necessary for the defendant to know that he was breaking "any *particular* law or any *particular* rule" (emphasis added); that the jury might consider the amount of profits made on a certain transaction and whether appellants had a pecuniary or financial interest in the outcome of the transactions.

While these statements taken separately may seem misleading, we believe that this portion of the charge, read as a whole, adequately informed the jury of the government's obligation to prove guilty knowledge. The Court said: "An act is wilful if it is done knowingly, deliberately and with an evil motive or purpose. . . . (T)he significant fact is the particular defendant's state of mind." In its context the statement that the defendants need not have known they were breaking "any particular law" signified that they must be shown to have known their actions were illegal even if they did not know exactly which statute they violated.

The Court then suggested criteria by which to evaluate the circumstantial evidence bearing on intent. Incriminating inferences, it suggested, might be drawn from documents which did not accurately depict the transactions they related to, from documents "made up, if you so find, to conceal what you regard as the actual facts in the transaction," from the use of dummy nominees and "of exchange checks to disguise the payment of money." Finally, in discussing the defendants' contention that they were protected by their reliance on legal opinions, the Court charged that reliance on legal advice did not always constitute a complete defense; otherwise

> "regardless of the consciousness of wrongdoing on his part and perhaps on the part of his legal advisor, the advice of counsel would operate to confer immunity from punishment. Such is not the case.
>
> "However, if a man honestly and in good faith seeks advice of a lawyer as to what he may lawfully do, and if he fully and honestly lays the facts before his counsel and in good faith honestly follows that advice, relying upon it and believing it to be correct, and only intends that his acts shall be legal, he could not be convicted of a crime which involves wilful and unlawful intent even if the legal advice that he received was erroneous.
>
> "But, on the other hand, no man can wilfully and knowingly violate the law and attempt to excuse himself from the consequences by arguing that he followed the advice of counsel."

Furthermore this portion of the charge on requisite criminal intent[6] as to the substantive counts was supplemented

---

6 There is some dispute whether knowledge of illegality of sale need be shown to satisfy the "wilfulness" requirement of the Securities Act if the seller knew that the stock was control stock and that it was not

by the statement made a few minutes earlier in the charge on the conspiracy count that "a knowing participation in a scheme having as an objective the knowing violation of the Securities Laws or the knowing violation of the Mail Fraud statute" was required.

The Court properly instructed the jury that the Rule 133 "merger" exemption from the registration requirements did not apply to a subsequent resale of the stock acquired in the United Dye-Handridge merger. 17 C. F. R. §230, 133; see *United States* v. *Crosby, supra*, at 939; *SEC* v. *Culpepper*, 270 F. 2d 241, 247-48 (2d Cir. 1959). Appellants assert that the trial court erred in refusing to charge the jury that it might consider the extent to which the application of Rule 133 was unclear in 1956. However, it is at best doubtful that appellants were entitled to such a charge, since there was no evidence that they in fact had been misled by an incorrect analysis of this exemption. Indeed, the opinion letters relied on by Berman correctly advised that the stock was freely tradeable only if the seller were not a control person. In any event, the trial court did remind the jury of appellants' contention that "they acted on the advice of lawyers, that they were told that Rule 133 exempts the stock, that they didn't know that the stock had to be registered."

We have carefully considered the other contentions pertaining to legal errors in the charge and have found them to be without merit.

General Unfairness and Admission of Prejudicial Evidence

Dardi asserts that the trial court's rulings evidenced unconscious discrimination against defendants, the cumula-

registered. See Loss, *Securities Regulation* 1986, 1309 and Supp. 1962 (discussing *United States* v. *Crosby, supra*). Since the charge was adequate on either view, we need not consider whether it gave the defendants an advantage to which they were not entitled.

tive effect of which requires reversal; in the alternative, he points to various rulings which by themselves are said to require reversal. The innuendo that the trial court did not carry out its judicial obligations is completely unfounded.

1. Shawano and Bon Ami.

Much of Dardi's criticism of the integrity of the trial can be attributed only to the nature of the conspiracy itself. For example, Dardi contends that admission of evidence concerning Bon Ami and Shawano Development Corporation resulted in prejudicial error requiring reversal. On direct examination, Guterma was allowed to tell of a prior conviction under the Securities laws involving both Bon Ami and Shawano stock. See *United States* v. *Aronson*, 319 F. 2d 48, 51 (2d Cir.), *cert. denied*, 32 U. S. L. Week 3187 (U. S. Nov. 18, 1963). Thereafter, transactions involving each corporation were put before the jury. Thus, Guterma testified that $150,000 of the $450,000 which Garfield and Pasternak transferred to United Dye in exchange for the release of the "pipeline" guarantee was channeled through Kent Window Corporation, a subsidiary of Shawano. Bon Ami was scrutinized more thoroughly. The liquid assets of Bon Ami were thus shown to have been used to satisfy the $519,000 Murchison obligation and to enable United Dye to repay the short-term debt incurred when Bon Ami was acquired. In each instance the transaction was relevant to show the close relationship between Guterma, Garfield and Pasternak and the mechanics by which the major purpose of the conspiracy was effected. And, Dardi's cooperation with and proximity to the "executive" group during these dealings was "highly relevant to the issue of criminal intent and knowing complicity in the fraud and conspiracy." *United States* v. *Crosby*, *supra*, at 946.

2. The Deputy Marshal Incident

Appellants urge that the trial court erred in denying a mistrial when a Deputy United States Marshal, assigned to escort Dardi during court appearances, engaged in a brief conversation with a juror. The trial court carefully investigated the incident, determined that the juror had not been influenced, and gave cautionary instructions. Under the circumstances, the court's denial of the motion for mistrial was not an abuse of discretion.

3. The Mayers Letter and Stock Purchasers' Testimony

Appellants insist that there was error in allowing the jury to examine the "Mayers" letter, portions of which they characterize as anti-Semitic and vulgar. Since the offensive language did not refer to any of the appellants, it is difficult to see now prejudice resulted from this incident. Similarly, there is no merit in the contention that appellants were prejudiced by the testimony of the unfortunate purchasers of United Dye stock. Such testimony was relevant to numerous counts of the indictment.

4. Pleas of Guilty During the Trial

At the commencement of the trial, there were twelve individual defendants. After three weeks of trial, three pleaded guilty, including the defendant Garfield who had been closely associated with Guterma in the financial schemes under attack. Some three months later another defendant, Brann, announced his intention to enter a guilty plea and subsequently became a Government witness. In July 1962 Pasternak, also prominently involved with Guterma, pleaded guilty. Other guilty pleas were entered in July and September. Although taken in the jury's

absence, the jury could not have been unaware of these pleas. Appellants argue that under these circumstances a fair trial was impossible and that "The presumption of innocence could not have survived the parade of guilty pleas and the recitations." Dardi recognizes this court's decisions in *United States* v. *Crosby, supra; United States* v. *Falcone*, 109 F. 2d 579 (2d Cir.), *aff'd*, 311 U. S. 205 (1940); *United States* v. *Rollnick*, 91 F. 2d 911 (2d Cir. 1937), but claims that the many guilty pleas from defendants tied in to the same conspiracy seriously prejudiced the remaining defendants.

Of course, in any multi-defendant trial, there is a real danger that the admission of guilt by one defendant, particularly in a conspiracy case or one in which the defendants have acted jointly, will react unfavorably against other defendants. However, no rule of law has yet been promulgated which forbids a defendant from so pleading during trial. This court, as have courts of appeals in other circuits, has faced this problem and has held in conformity with "the federal courts [which] have uniformly held it not error, if proper cautionary instructions are given, for the jury to be informed during trial that one or more defendants have pleaded guilty, or even for the jury to be present when the pleas are entered." *United States* v. *Crosby, supra* at 948; see also *United States* v. *Aronson, supra; United States* v. *Murray*, 297 F. 2d 812 (2d Cir.), *cert. denied*, 369 U. S. 828 (1962); *United States* v. *Freeman*, 302 F. 2d 347 (2d Cir. 1962). The instructions given by the trial court after each plea, together with its comments on this subject in the charge, met the law's protective requirements.

IV.

Specific Errors

Restrictions on Lehrich's Cross-Examination

Dardi argues that the restrictions imposed upon the cross-examination of witness Lehrich was a denial of due process of law, and in the alternative, an abuse of discretion under the federal rule of the scope of cross-examination. Lehrich was an officer and director of United Dye and was Guterma's legal adviser. He was named as a co-conspirator, but was not a defendant. On its direct case, the Government called Lehrich to give testimony concerning what the parties have characterized as the "Bender" affair. Because of the limited scope of the direct examination, the trial court refused to permit defense counsel to cross-examine on the events of 1955 and 1956.

The trial court was justified in the exercise of its discretion in limiting cross-examination to the scope of the direct. *United States* v. *Minuse*, 142 F. 2d 388, 389 (2d Cir.), *cert. denied*, 323 U. S. 716 (1944). Moreover, during Lehrich's cross-examination (cross-examination by Dardi's counsel covers some 250 pages of transcript), the court gave defense counsel "widest latitude to impeach Lehrich on such matters as bias, interest, hostility, special relationship to the government, and motivation to falsify, . . . " Cf. *United States* v. *Bentvena, supra*, at 940-41. In any event, the trial court advised counsel that if Lehrich was called as part of the defense case, he could be examined on the events of 1955 and 1956 as a hostile witness. Having failed to avail himself of this opportunity, Dardi cannot now complain.

The "Bender" Affair

To show Dardi's "consciousness of guilt," the Government adduced testimony involving an attempt to quash a SEC investigation of United Dye through the intercession of former Senator George Bender, then Special Assistant to the Secretary of the Interior. Dardi argues that there was a failure of proof in regard to the "Bender" episode which resulted in substantial prejudice.

The "Bender" affair was alluded to first in the Government's opening and was developed in more detail during Guterma's direct examination. While Guterma's testimony on this matter was restricted to Dardi, the only participant remaining in the case, he was completely exonerated by Guterma's account, and the jury was thoroughly instructed to that effect. Thereafter, Lehrich testified in substance that he had told Dardi of a conversation he had had with Garfield in which Garfield had spoken of a commitment for $100,000 which he (Garfield) had with Bender; that Guterma was obligated for $30,000 of the commitment and Dardi for $20,000; that Garfield would like them to meet their obligations; that Dardi said that he had made such a commitment but was out of funds at the moment but that he would talk to Garfield about it. Lehrich then told of a previous conversation in which Garfield had said that Bender might be helpful in connection with a pending SEC investigation; that Garfield said that he told Dardi, Guterma and Eveleigh of his projected trip to Washington to see Bender and that he had seen Bender.

There was no failure of proof. Lehrich's testimony, if believed, might well have been sufficient to have implicated Dardi. And in view of the trial court's adequate and specific direction to the jury that the Bender episode was being offered only as to Dardi, the conclusory claims of prejudice by the other appellants are without merit.

The Prosecutor's Comments on Summation as to Cumulative Testimony

Error is asserted in the court's refusal to grant Dardi's motion for a mistrial because of the prosecutor's statement in summation that Lehrich and Eveleigh if called would have testified cumulatively to Guterma. Apparently the prosecutor felt piqued to make this comment because of references in the summation of defense counsel to the failure of the prosecution to call them as witnesses. Counsel for the prosecution and the defense definitely should not put forward their own views as to the possible testimony of witnesses not called or tell the jury their own reasons for not calling them. However, here the jury had adequate affirmative testimony to support its verdicts and the prosecutor's comments under the circumstances do not constitute reversible error.

Berman's Inspection of Prior Testimony

Upon Berman's cross-examination, the Government read various questions and answers from Berman's prior testimony to the SEC and the Stock Frauds Unit of the office of the Attorney General of New York. While counsel was permitted to examine each question and answer, the court did not allow counsel to read the transcripts as a whole or those portions surrounding the questions and answers alluded to. At the completion of cross-examination, the court took it upon itself to read both transcripts "for the purpose of finding out whether there is any material or relevant qualifying or explanatory context of the questions and answers . . . used."

In *United States* v. *Stone*, 282 F. 2d 547, 552 (2d Cir.), *cert. denied*, 364 U. S. 928 (1960), this Court affirmed the proposition that "when the prosecution uses testimony of a defendant before the grand jury, the defendant must be allowed to inspect it." See *United States* v. *Cotter*, 60 F. 2d

689 (2 Cir.), *cert. denied*, 287 U. S. 666 (1932). In *Stone*, where the Court did not examine the transcript, this Court on appeal reversed the conviction on one count since it was not certain that the grand jury transcript which this Court had examined would not have been "far more effective than what the trial jury may well have regarded as an invented and self-serving explanation of the inconsistency." In *Cotter*, however, the trial court did read the transcript; and, because appellants there "chose to rest upon the bare denial of their right" and had shown no prejudice, the convictions were affirmed.

Here, as in *Cotter*, there is no showing of prejudice. Berman eventually did obtain a copy of his SEC testimony, although from a source other than the trial court or prosecutor, in such time that he might have used it had he so desired. As to the Attorney General's transcript, it appears from the record that Berman abandoned his requests to examine it personally. He was not entitled to the full transcript until the Government used it on cross-examination. See *United States* v. *Murray*, *supra*, at 821. When the request was first timely made, after cross-examination, the trial court suggested that Berman raise the matter again. Although Berman thereafter pressed for the SEC material, no further demand was made for the Attorney General's transcript. Berman expressed his appreciation to the trial court for undertaking to read the transcript, but did not inquire later as to what the trial court's reading had disclosed. Under these circumstances, it is clear that Berman seeks to take advantage of circumstances which arose due to his own inaction. His claim does not merit reversal of his conviction.

Assignment of Counsel for Rosenthal

Rosenthal argues that the trial court's failure to adjourn the trial because of his counsel's illness, and its subsequent

assignment of a co-defendant's counsel requires reversal. Examination of the events surrounding Rosenthal's original counsel's disability, his unsuccessful efforts to secure another counsel willing to proceed without an inordinate continuance and the arrangements finally made lead to the conclusion that the trial court's treatment of the matter was entirely reasonable under the circumstances, and that Rosenthal suffered no prejudice. Rosenthal had a month's notice that his lawyer's health was questionable. His original counsel was available for consultation with his replacement. His defense had not been unduly complicated. The trial court, therefore, properly refused the continuance of "at least a month and a half to two months" requested by the lawyer Rosenthal selected. Rosenthal was unable to make satisfactory financial arrangements with other counsel; consequently, the court appointed the counsel of another defendant, Cornelius De Vroedt, Inc., who had also represented the individual defendant DeVroedt prior to his severance due to illness. Rosenthal, Cornelius DeVroedt and the DeVroedt Corporation were charged with "substantially the same acts," and the Court specifically found that the assignment would not give rise to a conflict of interests, but indicated that if a conflict were to arise, the appropriate precautions would be taken.

While the right to counsel is absolute, its exercise must be "subject to the necessities of sound judicial administration." *United States* v. *Arlen*, 252 F. 2d 491, 494 (2d Cir. 1958); and where there appears to be no conflict, the court may, in its discretion, assign to a defendant the attorney of a co-defendant. See, *e.g.*, *Danziger* v. *United States*, 161 F. 2d 299, 301 (9th Cir.), *cert. denied*, 332 U. S. 769 (1947). Such an assignment is not, in itself, a denial of effective assistance of counsel. Since *Glasser* v. *United States*, 315 U. S. 60 (1942), it has been clear that some conflict of

interest must be shown before an appellant can successfully claim that representation by an attorney also engaged by another defendant deprived him of his right to counsel. See *United States* v. *Bentvena*, *supra* at 937 and cases there cited. During the Government's direct examination of Barkley, there arose the possibility that a conflict of interest might occur during cross-examination. At that point Cornelius DeVroedt, Inc. entered a plea of *nolo contendere* and was severed, thus removing any possible conflict.

Rosenthal makes the further argument that the trial court improperly denied his request to put a series of "exculpatory" questions to a former salesman who had invoked the Fifth Amendment. This argument proceeds on an erroneous notion of evidence that may be submitted for the jury's consideration. An attempt to influence the jurors in the manner suggested was correctly rejected by the trial court.

Impeachment of Witness McCollom

McCollom was a defense witness called to rebut Brann's testimony. He testified that Brann's reputation in Geneva, Switzerland, for truth and veracity was "just as poor as it could possibly be." On cross-examination, the prosecution asked McCollom whether or not there was a warrant of arrest outstanding against him in Switzerland for embezzlement of $50,000. Apparently, the Government sought to show that McCollom was motivated to lie about Brann because Brann had been responsible for bringing the embezzlement charges. However, McCollom denied that an arrest warrant existed and the Government was prevented from pursuing the inquiry. Dardi relies on *Michelson* v. *United States*, 335 U. S. 469 (1947) in urging that the Government's inquiry requires reversal. That case, however, concerned the use of evidence of a prior conviction

after the defendant had placed his character in issue. Here, the question was aimed at impeaching a witness' credibility by showing his hostility and bias. While an arrest alone is not normally admissible to impair the credibility of a witness, the fact that it might have embittered him so as to motivate him to testify as he has may be relevant. In any event, the incident complained of, when viewed in context, was not so prejudicial as to require reversal.

Timm's Appearance Before the Grand Jury During the Trial

Reversible error is attributed to the prosecutor's acts in calling Alexander Timm, Dardi's former personal secretary and an officer and director of United Dye, before the Grand Jury. The reason advanced by the prosecutor for this action was that Timm's testimony was relevant to a possible conspiracy to obstruct justice. Dardi in turn claims that the prosecutor was only using this reason as a subterfuge to gather valuable evidence and to put pressure on Timm so as to obtain information and leads for use on the trial.

The merits of these conflicting contentions were carefully considered by the trial court in a seven-page opinion dictated into the record, denying a defense motion for a mistrial and the suppression of evidence. The trial court read Timm's Grand Jury testimony, properly recognized the principle of law that "It is improper to utilize a Grand Jury for the sole or dominating purpose of preparing an already pending indictment for trial" and came to the conclusion that under the particular facts before it (no useful purpose will be served by outlining the Government's futile subpoena efforts) "the Grand Jury's inquiry into a possible conspiracy to obstruct justice was conceived and carried out in good faith and in a manner that did not prejudice the complaining defendant," and that Timm's Grand Jury

subpoena did not constitute "the use of a Grand Jury as a subterfuge to elicit testimony for use at this trial." Under all the circumstances, this conclusion must be sustained.

The jury had full opportunity to hear the explanations advanced by capable counsel during most extensive summations in complete exculpation for appellants' every act. The four days required by the jury to reach their verdicts scarcely bespeak a snap judgment. In final analysis, the resolution of the facts and the inferences to be drawn therefrom were for jury decision. After consideration of all the many assertions of error, none of the points, individually or collectively, demonstrate that the defendants were deprived of a fair trial.

Judgments affirmed.

APPENDIX B

Constitutional Provisions and Federal Rules of Criminal Procedure Involved

United States Constitution:

5th Amendment:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

6th Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

Federal Rules of Criminal Procedure:

Rule 7(f):

Bill of Particulars. The Court for cause may direct the filing of a bill of particulars. A motion for a bill of particulars may be made only within ten days after arraignment or at such other time before or after arraignment as may be prescribed by rule or order. A bill of particulars may be amended at any time subject to such conditions as justice requires.

Rule 16:

Discovery and Inspection. Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. The order shall specify the time, place and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just.

Rule 17(c):

For Production of Documentary Evidence and of Objects. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers,

documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 166

CHARLES BERMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on March 17, 1964, which affirmed a judgment of conviction in the United States District Court for the Southern District of New York, under which petitioner was sentenced to six years in prison and a total of $35,000.00 in fines.

The Opinions Below

The District Court wrote no Opinion. The Opinion of the Court of Appeals is officially reported at 330 F. 2d 316. It is printed in Appendix "A" hereto (*infra*, pp. A1-A41).

The judgment of the Court of Appeals sought to be reviewed is printed in Appendix "B" hereto (*infra*, p. B1).

Statement of Grounds of Jurisdiction

The judgment of the Court of Appeals sought to be reviewed was dated and entered March 17, 1964. A Petition for Rehearing was denied on April 10, 1964. An Order extending petitioner's time to file a Petition for Writ of Certiorari was granted by Mr. Justice Harlan on April 28, 1964. The jurisdiction of this Court is invoked under Title 28 U. S. C. Section 1254.

Questions Presented

1. Did the trial below pass beyond the absolute limit of a criminal conspiracy prosecution so as to deny petitioner due process of law in that the extended duration of the trial, the great variety and complexity of the transactions presented to the jury, the large number of witnesses and massive exhibits, obliterated the individual rights of the petitioner who was charged with, at most, peripheral participation in one segment of the alleged securities fraud scheme and who was not even remotely connected with the overwhelming mass of evidence presented in thousands of pages of testimony over a period of more than eleven months.

2. In order to satisfy the requirement of wilfulness in a prosecution under Section 24 of the Securities Act of 1933 for violating the federal securities laws, must the proof of the defendant's individual criminal intent and guilty knowledge be substantial and convincing, particularly in the context of a conspiracy prosecution, and

must the jury find that the defendant knew that the activities in which he was involved violated the law.

3. Was the principle of fairness enunciated in *Jencks v. United States*, 353 U.S. 657 (1957), violated when the trial court refused to permit petitioner to examine transcripts of his prior testimony given before government agencies, where such transcripts are in the possession of the United States Attorney and have already been used at the trial in the cross-examination of petitioner.

Constitutional Provisions, Statutes and Rules Involved

The Constitutional provision involved is the Fifth Amendment of the Constitution of the United States, which, in pertinent part, provides:

> "No person shall * * * be deprived of life, liberty, or property, without due process of law. * * *"

The statutes involved are Title 18 U.S.C. Sec. 371; Title 15 U.S.C. Secs. 77b(11), 77e(a)(1) and 77x (Sections 2(11), 5(a)(1) and 24 of the Securities Act of 1933).

The Rule involved is Rule 133 of the General Rules of the Securities and Exchange Commission.

The statutes and rules, insofar as here material are set forth in Appendix "C" hereto (*infra*, pp. C1-C3).

Statement of the Case

Petitioner, a partner in a small "over-the-counter" brokerage house, G. F. Rothschild & Co., was convicted under the general conspiracy count and five substantive counts of the indictment, charging specific sales of unregistered securities. The indictment alleged an extensive

securities fraud involving the stock of United Dye and Chemical Corporation (herein referred to as "United Dye").

The indictment named thirty-three defendants and seventeen co-conspirators and contained thirty counts. Prior to trial thirteen defendants were severed upon Government motion and four entered pleas of guilty.* During the trial, nine defendants pleaded guilty, one was severed due to illness and one entered a plea of *nolo contendere* (A3). The trial extended over a period of 342 days, of which approximately 200 were actual days in Court. Seventy-five witnesses testified and hundreds of exhibits were introduced, embodying thousands of papers.

The Government presented the case as a complex, comprehensive scheme in six "phases":

1. Acquisition of control of United Dye, through the purchase of a block of United Dye shares by Guterma, distribution of shares thereof to other charged co-conspirators, an option to Dardi and the election of various charged conspirators as officers of United Dye. *There was no evidence that petitioner had any part in, or had any knowledge of these transactions.*

2. Acquisition of the stock of Franklin County Coal Corporation (herein "Franklin County") by Guterma, Garfield and Pasternak. This phase included purchase of the shares from John and Clint Murchison, Jr., in return

* Prior to trial and during the trial itself petitioner sought on several occasions to have his case severed. (See e.g.: 797, 1065, 10010). These motions to sever were all denied. Numbers in parentheses preceded by the letter "A" refer to pages of the Appendix hereto. All other numbers in parentheses refer to the page numbers of the stenographer's minutes included in the record transmitted to this Court.

for a promissory note of Garfield and Pasternak and deposit of the stock with the Murchisons as security. In addition, there was a transaction involving a loan from Guterma, Garfield and Pasternak to Franklin County of $800,000 to redeem a mortgage debt to the Murchisons. *Again, there was no evidence that petitioner had any part in, or had any knowledge of these transactions.*

3. Placing Franklin County within a corporate shell, Handridge Oil Corporation (herein "Handridge"), and issuing in exchange therefor, 500,000 shares of Handridge. This included the formation of Handridge, the conveyance to Handridge of the interests of Garfield and Pasternak in Franklin County, and the transfer of the Handridge shares by them to Swann, in trust for Garfield, Pasternak and Guterma. *Again, there is no evidence that petitioner participated in any way in these transactions.*

4. Merging Handridge into United Dye through an exchange of 575,000 shares of United Dye stock for the same number of Handridge shares. This included a prior sale of 75,000 Handridge shares to others, among them United Dye directors, and use of an escrow agent to conceal ownership; the sale of a block of United Dye shares through nominees, who were made to appear as borrowers under loan agreements, so as to force down the market price of United Dye shares before the date of the closing of the merger; revision of the merger agreement prior to closing so as to delete the requirement that the Franklin County stock be free and clear and to provide that United Dye would assume the note to the Murchisons and that Garfield and Pasternak would pay United Dye $510,000 plus $9,000 for the accrued interest. In connection with this phase, the Government introduced a mass

of evidence concerning the means by which Garfield and Pasternak obtained the funds to pay United Dye. This evidence covered an extensive series of complex transactions, including the acquisition of control of the Bon Ami Company; various loan transactions with that company; creation of B. A. Royalties, Inc. (herein "B. A. R.") by the Bon Ami Executive Committee; creation of Diversified Oil & Mining Corporation (herein "D. O. M.") by Guterma, Garfield and Pasternak; various transactions between Bon Ami, B. A. R. and Garfield and Pasternak; and various transactions between D. O. M., Bon Ami and Garfield and Pasternak. Further, in connection with this phase the Government introduced evidence of a Garfield and Pasternak guarantee of the minimum profit from the Franklin County pipeline and a pledge of United Dye shares as security therefor, subsequent waiver of the guarantee by the United Dye Board for the transfer of cash and D. O. M. shares which were valued at an arbitrarily excessive figure. *There was no evidence that petitioner participated in any way in any of these series of complex and complicated transactions, or had any knowledge thereof.*

5. Selling most of the 575,000 shares of United Dye distributed in the merger with Handridge without a registration statement. Only in this phase was any evidence introduced which related in any way to petitioner. As we discuss below, the thread of evidence (described below) which alone can support a conviction under Section 24 of the Securities Act of 1933 and Section 371 of Title 18 of the United States Code, is here so attenuated that to rest a conviction upon it virtually eliminates from the crime charged the requirements of criminal intent and guilty knowledge. Even the evidence on this phase does not substantially relate to petitioner. Evidence of the

sale of United Dye shares concerned a number of brokers and not merely petitioner.* The only relevant Government testimony as to petitioner came from Guterma in less than one hour of his many weeks of testifying. This direct testimony covered only five pages of the more than 27,000 pages of trial minutes (1631-1633, 1636-1636(A)).

6. Manipulating the price and market activity of United Dye stock. This evidence related to activities of Hughes in opening several brokerage accounts and purchasing in the name of relatives, friends and nominees. It also involved the activities of Brann, an important Government witness, who testified to sales of United Dye in Europe and North Africa, and the use of a European bank as a "front" for these activities. After presenting a case involving a maze of financial transactions in the United States, meetings throughout the country and properties ranging from oil to kitchen cleansers, the Government completed its picture with Brann's testimony of international financial fraud and intrigue, capped with evidence of international perfidy.** *There is no evidence that petitioner had any connection with any of these activities.*

* There was evidence of the activities of McGrath Securities Corp., I. F. Stillman & Co., Rockwell Securities Corp., J. H. Lederer & Co. and R. B. Gravis, Inc. and the principals thereof, relating to the sale of the United Dye shares.

** The Government's case was climaxed by its attempt through its first witness, Guterma, and its last witness, Lehrich, to prove an alleged "bribe" of a former United States Senator, George Bender, who was then on a special day-to-day assignment with the Department of Interior. (422, 1750, 1788-92, 18462-640, 19099-19101) Of the three defendants supposedly involved in this matter, two pleaded guilty during the trial (1001, 1033-33A, 9448-71), and the third, Dardi, was exculpated by Guterma's testimony (1852-1853) and not incriminated by Lehrich who testified that nothing unlawful was done in seeing Bender. (18193-6, 18975, 18990-91, 19127-31, 19133). Nevertheless, the jury had listened to this sensational testimony for days.

Thus, the pervasive result of subjecting petitioner to the trial had below was the inundation of petitioner's individual knowledge, intentions and acts by a mass of prejudicial and inflammatory "proof" unrelated to him.

Guterma's testimony regarding petitioner, upon which the Court of Appeals relied exclusively to support the conviction (A15-A16), occupied no more than one hour of the 342 day trial. The cross-examination of Guterma on this subject involved an almost equally short period of time. The witness Reese, an alleged nominee of Swann, testified for portions of three days, identified certain correspondence from and to G. F. Rothschild & Co. and stated that he never informed anyone at Rothschild of any private deal with Swann (12701). The witness Sund, the cashier at G. F. Rothschild & Co. during the period covered by the indictment, testified as to the amount petitioner received when he left the firm and petitioner's conduct in the firm as a person in authority. Sund's testimony, which took the better part of half of one day, did not concern the nature of the relationship between petitioner and the vendors of United Dye shares or any other charged conspirators (16242-16294).

The Government's witness Hughes testified in two pages of the transcript regarding an innocuous conversation with petitioner (11922-11923). Leonhardt and Barkley testified that they never met petitioner (9990, 16769, 17418-17426) but both sought to connect petitioner with Guterma by brief references to statements allegedly made by Guterma regarding petitioner on matters which even Guterma's own testimony does not support.*

* None of the witnesses who were purchasers of United Dye shares from G. F. Rothschild & Co. testified to any activities or statements of petitioner. (Testimony of Anna Haman and George J. Buckner, 15855-15860, 16037-16145).

Petitioner testified for varying periods on January 3, 4, 7 and 9th, 1963 (23375-23390, 23410-23481, 23592-23595, 23606-23634, 23639-23743, 23794-23861, 23879-23932, 23946-23973). Half of these days was devoted to conferences at the bench and in chambers regarding the Government's use of transcripts of prior testimony of the petitioner before the New York State Attorney General and the United States Securities and Exchange Commission.* At no time during petitioner's examination, cross-examination and redirect did he have a copy of the transcript of his testimony before the Attorney General. Only on the last day—when it was too late to have any effective use to petitioner—when both cross-examination and redirect were concluded, did he finally obtain, without the Government's aid, a copy of his S. E. C. transcript. Nevertheless, the Government extensively utilized these transcripts and a substantial portion of the cross-examination of petitioner consisted of the Government's attempt to establish some inconsistency between petitioner's testimony and his prior testimony as contained in the transcripts.

Reasons for Granting the Writ

1.

The conviction of petitioner presents to this Court in, perhaps unparalleled sharpness, the submergence of the principle of individual innocence or guilt in the interpretation of the "safety rules" governing broad, complex conspiracy trials. For years this Court has warned of the dangers inherent in criminal conspiracy cases. In *Krulewitch* v. *United States*, 336 U. S. 440, 453, 454 (1949), Mr. Justice Jackson, in a concurring opinion joined in by

Mr. Justice Frankfurter and Mr. Justice Murphy, declared:

> "The trial of a conspiracy charge doubtless imposes a heavy burden on the prosecution, but it is an especially difficult situation for the defendant. The hazard from loose application of rules of evidence is aggravated where the Government institutes mass trials. Moreover, in federal practice there is no rule preventing conviction on uncorroborated testimony of accomplices * * *
>
> "A co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrongdoing by somebody. It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together. If he is silent, he is taken to admit it and if, as often happens, co-defendants can be prodded into accusing or contradicting each other, they convict each other."

In *Blumenthal* v. *United States*, 332 U. S. 539, 559 (1947), Mr. Justice Rutledge, after considering the rule governing declarations of co-conspirators, stated:

> "* * * The danger rested * * * in the risk that the jury, in disregard of the court's discretion, would transfer, consciously or unconsciously, the effect of the excluded admissions from the case as made against Goldsmith and Weiss across the barrier of the exclusion to the other three defendants.
>
> "That danger was real. It is one likely to arise in any conspiracy trial and more likely to occur as the number of persons charged together increases. Perhaps even at best the safeguards provided by clear rulings on admissibility, limitations of the bearing of evidence as against particular individuals, and adequate instructions, are insufficient to ward off the danger entirely * * *."

In *Kotteakos* v. *United States*, 328 U. S. 750, 773 (1946), Mr. Justice Rutledge described the dangers inherent in a mass trial in a conspiracy case in the following language:

> "Numbers are vitally important in trial, especially in criminal matters. Guilt with us remains individual and personal, even as respects conspiracies. It is not a matter of mass application. There are times when of necessity, because of the nature and scope of the particular federation, large numbers of persons taking part must be tried together or perhaps not at all, at any rate as respects some. When many conspire, they invite mass trial by their conduct. Even so, the proceedings are exceptional to our tradition and call for use of every safeguard to individualize each defendant in his relation to the mass. * * *
>
> "Criminal [these defendants] may be, but it is not the criminality of mass conspiracy. They do not invite mass trial by their conduct. Nor does our system tolerate it. That way lies the drift toward totalitarian institutions. True, this may be inconvenient for prosecution. But our Government is not one of mere convenience or efficiency. It too has a stake, with every citizen, in his being afforded our historic individual protections, including those surrounding criminal trials. About them we dare not become careless or complacent when that fashion has become rampant over the earth."

This Court has manifested a deep concern for the accused's rights when confronted with the unique and ubiquitous difficulties of a complex mass criminal conspiracy trial. *Cf. Delli Paoli* v. *United States*, 352 U. S. 232, 241 (1957); *Schaffer* v. *United States*, 362 U. S. 511, 524 (1960) (dissent).

Nor has this Court been alone in its concern regarding the inherent dilution of individual responsibility in a mass

conspiracy trial. See authorities cited in *Schaffer* v. *United States*, *supra*, at p. 524 of 362 U. S., footnote 8. A quarter of a century ago, Judge Learned Hand spoke of the criminal conspiracy case in the following language:

> "Today * * * many prosecutors seek to sweep within the dragnet of conspiracy all those who have been associated in any degree whatever with the main offenders. That there are opportunities of great oppression in such a doctrine is very plain, and it is only by circumscribing the scope of such all comprehensive indictments that they can be avoided." *U. S. v. Falcone*, 109 F. 2d 579, 581 (2nd Cir. 1940); *aff'd.*, 311 U. S. 205 (1940).

In *United States* v. *Central Supply Ass'n.*, 6 F.R.D 526 (N.D. Ohio 1947) the Court held that the complex criminal conspiracy case before it could not properly be submitted to a jury, because the magnitude and nature of the trial and evidence had resulted in each defendant losing his individuality in the mass. After analyzing the *Kotteakos* decision and concluding that its warning against the dangers of mass trials applied whether or not there had been a variance between indictment and proof, the Court declared:

> "There is somewhere an absolute limit to a criminal trial and the Supreme Court has plainly recognized that fact." (at p. 534 of 6 F.R.D.)

This Court is presented here with the question whether these expressed concerns and warnings of danger are mere lip-service to high-sounding principles of individual liberty or are intended to set up a meaningful and effective shield to protect the accused from a trial where his individuality is obliterated and guilt becomes a matter of atmosphere and imputation. The critical issue here is

whether the trial to which petitioner was subjected passed the "absolute limit" of a criminal conspiracy prosecution beyond that point at which constitutional protections and this Court's administration of justice in the federal courts will not permit a trial to proceed. We respectfully suggest that the annals of the criminal law provide few examples which, as starkly as the plight of this petitioner illustrate the extinction of the individual's rights in the bright flash of a block-buster conspiracy trial.

Petitioner respectfully submits that this clash between the individual rights of one accused in a criminal trial and the rules of law governing federal criminal conspiracy cases is a matter peculiarly appropriate for review and consideration by the Highest Court.

This issue is dramatically presented for review in the instant case. The volume and complexity of securities fraud conspiracy trials has sharply increased during the last degade.* The complex nature of the financial transactions, the volume of such transactions, the number of persons and the far-flung locales normally involved in these trials raise perplexing problems regarding the proper accommodation of conspiracy law doctrines in such cases. The trial to which petitioner was subjected was among the longest on record; the evidentiary materials were so abstruse, technical and involved as to challenge the capacity of any jury. And over this bewildering nexus, the Government painted a special gloss of "big-

* See e.g., *Addison v. United States*, 317 F. 2d 808 (5th Cir. 1963), *cert. den.*, U. S. , 84 S. Ct. 658 (1964); *Greenhill v. United States*, 298 F. 2d 405 (5th Cir. 1962), *cert. den.*, 371 U. S. 830 (1962), 372 U. S. 968 (1963), *reh. den.* 373 U. S. 947 (1963); *Peel v. United States*, 316 F. 2d 907 (5th Cir. 1963), *cert. den.*, 375 U. S. 896 (1963); *United States v. Doran*, 299 F. 2d 511 (7th Cir. 1962), *cert. den.*, 370 U. S. 925 (1963), *reh. den.* 371 U. S. 854 (1962).

league" financial chicanery, with all of the implied opportunities for guilt by association, obfuscation of evidence and obliteration of individual rights and responsibilities. At such a trial, petitioner's mere presence in the dock for more than eleven months was enough to convict.*

Petitioner's particular position in the securities fraud which was the subject of the massive trial below sharply underlines the issue of the rights of the individual accused. Of the more than 27,000 pages of transcript, fewer than 400 pages contain any government testimony remotely relating to any activities or statements of petitioner. Of the more than 60 witnesses called by the Government only seven had ever heard of petitioner during the period involved.**

* Added to this were the pleas of guilty during the trial by 7 of the 12 individual defendants present when the trial commenced and by 2 of the 4 corporate defendants. While petitioner steadfastly maintained his innocence throughout the trial, more than half of those who initially sat with him in the dock and who had originally asserted their innocence were removed from the case under circumstances in which the jury must have known that these co-defendants and charged co-conspirators had pleaded guilty (9567, 9646, 14698-99, 15189-96, 15233, 15235). The prejudicial impact of pleas of guilty by co-defendants is a danger inherent in any mass trial. Here, the number of pleas, their dispersement throughout the trial, the repeated roll-call of those that pleaded guilty and testimony before the jury that defendants removed from the dock had pleaded guilty, resulted in danger becoming disaster to petitioner.

** Appendix "D", *infra* lists all of the witnesses presented by the Government, the period during which each of these witnesses testified and the pages of the stenographic minutes in which their testimony is encompassed; punctuated by the ever present interruptions for sidebar conferences, colloquy, voir dire examination, etc. Of the Government's major witnesses, Guterma, Hughes, Brann, Leonhardt, and Barkley—whose testimony covered more than four months of the trial, three had never met petitioner, one testified to an innocuous conversation with petitioner and Guterma, in his brief direct testimony on petitioner, failed to testify that he informed petitioner or petitioner knew that Guterma and others had joined together as a controlling group to sell United Dye shares. Upon cross-examination, Guterma testified that he and petitioner personally never had any business transaction of any kind (5983). The Government's "case" against petitioner could have been completed within a week.

Of the more than twenty-five complicated financial arrangements and deals which the Government presented as part of the securities fraud scheme, the evidence regarding the petitioner related solely to his participation in sales of United Dye shares in the over-the-counter market through his brokerage house. This is not a case where the defendant has been charged with occupying a peripheral position in a conspiratorial scheme and the bulk or, at least, a good part of the evidence concerned defendant's peripheral activities. Rather, the instant case presents a peripheral defendant at a trial where the overwhelming mass of the evidence did not remotely relate to petitioner. The combination of the conspiratorial scheme drawn by the Government and the volume and character of the evidence at the trial has deprived petitioner of a determination of his innocence or guilt which is "individual and personal, even as respects conspiracies." *Kotteakos v. United States, supra.*

Petitioner respectfully submits that in today's society, where any commercial or business activity of any size requires the common effort of increasingly larger numbers of persons and where the various forms of such activities have become increasingly more complicated, the continued protection of the rights of the accused in a conspiracy case growing out of such activities is a vital matter, if any semblance of individual rights is to be effectively preserved in criminal cases.

2.

This case presents the issue of the nature and quantum of proof necessary to satisfy the requirement of wilfulness in a prosecution under Section 24 of the Securities Act of 1933 (15 U.S.C. 77x). While this Court has noted

that the meaning of the word "wilful" in a statute varies with the context and circumstances of the statutory provision (see *United States* v. *Murdock*, 290 U. S. 389, 394, 395 (1933)), it has not as of this day, delineated the meaning of this requirement in the context of the federal statutes and regulations punishing violations of the laws regulating securities transactions. Determination of this question is important to the administration and enforcement of the Federal securities law and in controlling the operation of the rules of law in criminal conspiracy cases in the newly-fertile area of securities transactions.

The instant case squarely raises the issue of wilfullness in two respects. First, there was no direct evidence whatever that petitioner had guilty knowledge or criminal intent during the period that United Dye shares were being sold. There was no direct testimony that petitioner knew the shares that were to be sold were owned or controlled by Guterma, or that Guterma agreed to pay commissions to petitioner or that petitioner ever entered into an agreement with Gutérma that he would sell the shares or that petitioner knew that the attorney, Swann, was working in concert with Guterma, and that his clients were merely strawmen through whom Guterma, Swann and other members of the controlling group were selling their shares. Any such conclusions were the result of inferences from evidence which, if divorced from the hundreds of days of testimony and thousands of exhibits unrelated to petitioner, would have been highly suggestive of innocence. *Cf. United States* v. *Standard Oil Company*, 23 F. Supp. 937, 939 (W. D. Wis. 1938). The quantum of proof which supported petitioner's conviction was slight and ambiguous. In *United States* v. *Crosby*, 274 F. 2d 928 (2nd Cir. 1961), *cert. den. sub. nom. Mittelman* v. *United States*, 368

U. S. 984 (1962), the same Court of Appeals which affirmed the conviction below found that in *Crosby* evidence of guilty knowledge and criminal intent must be "substantial [and] convincing."

The quality of wilfulness which makes one guilty of a crime such as car theft is plainly different from the criminal state of mind of those who join together to violate our complicated securities laws. Crime resulting from the wilful violation of a statute requires intent and intent includes understanding. *Morissette* v. *United States*, 342 U. S. 246 (1952); *Ingram* v. *United States*, 360 U. S. 672 (1959). Here, the element of intent was thinly spun.

There is thus presented here the question whether the proof necessary to establish the wilfulness required for a criminal conviction for violation of the federal securities laws must be substantial and convincing, where the individual defendants are tried in a massive complicated criminal conspiracy trial. The issue as phrased herein involves both the knowledge and intent required under the securities acts and in a massive criminal conspiracy trial precisely because it was the combination of the application of the detailed and complex provisions of the securities laws with the liberal rules of evidence in conspiracy cases which has resulted in petitioner's conviction.

The issue of wilfulness is further raised in the case at bar by reason of the trial court's charge that it was "not necessary for the government to establish that the defendant knew that he was breaking any particular law or any particular rule" (26415) joined with the failure to further charge that knowledge of violation of the law in general was necessary. Petitioner submits that this charge withdrew from the jury any consideration of whether he had knowledge of the illegality of the sale and that it,

therefore, constituted a direction by the court that it was not necessary to find knowledge of illegality.

The trial court's further charge that an act is wilful if done "with an evil motive or purpose", referred to by the Court of Appeals (A27), has been recognized by several Courts of Appeals as an inadequate charge on the issue of knowledge of illegality. See *Bloch* v. *United States*, 221 F. 2d 786, 789 (9th Cir. 1955); *United States* v. *Martell*, 199 F. 2d 670, 672 (3rd Cir. 1952). In its decision, the Court of Appeals below noted that there is a dispute as to whether knowledge of illegality of the sale is needed to satisfy the wilfulness requirement of the Securities Act (A28). Petitioner submits that this important issue is squarely presented herein by reason of the charge of the trial court and that it is deserving of this Court's review and consideration.

3.

This case presents an important issue involving the principles of fairness enunciated by this Court in *Jencks* v. *United States*, 353 U. S. 657 (1957). The Government cross-examined petitioner on the basis of prior testimony that he had given to the New York State Attorney General's office and to the Securities and Exchange Commission. At no time did the Government supply to the petitioner copies of transcripts of his prior testimony and at no time did the court direct the Government to do so. It is undisputed that prior to his testimony and during his cross examination, petitioner sought to obtain copies of these transcripts. The procedure finally adopted by the court of allowing petitioner's *pro tem* counsel* to inspect

* Notwithstanding the evidentiary and legal complexities inherent in the trial of a mass criminal conspiracy case, the trial court did not appoint counsel for petitioner who appeared *pro se* throughout the trial, except during his own testimony when petitioner was represented by counsel obtained by petitioner.

the specific questions and answers read to petitioner by the Government so as to assure accuracy in the reading and the court's inspection of the entire transcripts to ascertain the context of the questions and answers falls far short of the procedure which this Court found was required in the interest of justice and fairness in the *Jencks* decision. Petitioner submits that his need to inspect the transcripts was even greater herein than that required by the accused in the *Jencks* case for, in the case at bar, portions of these transcripts had in fact been expressly presented to the jury through the cross-examination of the petitioner.

The Court of Appeals found that Berman abandoned his request personally to examine the Attorney General's transcript, notwithstanding that petitioner requested such inspection prior to and during his cross-examination and that the court had refused applications by the defense on three different occasions to see more of the transcript than the material read by the Government (23531-23532, 23571, 23754-23755). The Court of Appeals apparently found no error in regard to the SEC transcript since appellant obtained a copy of this transcript from a source other than the court or United States Attorney on the day that cross-examination and redirect were concluded.

Petitioner submits that when the trial court denied his request to examine transcripts of his prior testimony while the Government was using portions of these transcripts in cross-examining petitioner, he was denied the right to a fair trial in the federal courts under the just procedures outlined by this Court in the *Jencks* decision. The issue of whether the principle of the *Jencks* decision, that the accused must be given the right to examine

Government documents, applies to documents possessed by the Government and used in the cross-examination of an accused is an important question for guaranteeing the fairness of criminal trials in the federal courts.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JESSE CLIMENKO,
Counsel for the Petitioner.

JESSE CLIMENKO,
MILTON S. GOULD,
JONATHAN W. LUBELL,
Of Counsel.

APPENDIX A

Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 187—September Term, 1963.

(Argued December 5, 1963 Decided March 17, 1964.)

Docket No. 28030

UNITED STATES OF AMERICA,

Appellee,

v.

VIRGIL D. DARDI, ROBERT B. GRAVES, CHARLES ROSENTHAL and CHARLES BERMAN,

Defendants-Appellants.

Before—MOORE, FRIENDLY and KAUFMAN,

Circuit Judges.

Appeal by four defendants from judgments of the District Court for the Southern District of New York entered after a jury trial, William B. Herlands, *Judge*, convicting them of conspiracy to sell unregistered securities in violation of 15 U. S. C. §§77(e)(a), e(c), q(a) and X, 78i(a), j(b) and ff(a), 18 U. S. C. §1341, Rules and Regulations Promulgated by the Securities and Exchange Commission, and to defraud the United States by impeding the function of the Securities and Exchange Commission; convicting Dardi of substantive counts under 15 U. S. C. §§78i(a)(2),

(a)(6) and ff(a) and 18 U. S. C. §2; and, convicting Gravis, Rosenthal and Berman of substantive counts under 15 U. S. C. §§77e(a)(1), 77x and 18 U. S. C. §2.

Affirmed.

Feldman, Kramer, Bam & Nessen, New York City (Maurice N. Nessen and Merton Sarnoff, New York City, of counsel), for appellant, Virgil D. Dardi.

Irwin L. Germaise, New York City (Bernard B. Polak, of counsel and Phillip C. Samuels, New York City, on the brief), for appellant, Robert B. Gravis.

John A. Vassallo, New York City, for appellant, Charles Rosenthal.

Gallop, Climenko & Gould, New York City (Milton S. Gould and Jonathan W. Lubell, New York City, of counsel), for appellant, Charles Berman.

Gerald Walpin, New York City (Robert M. Morgenthau, U. S. Atty., for the Southern District of New York, Peter H. Morrison, Robert J. Geniesse and Gerald Abrams, Asst. U. S. Attys., of counsel), for the United States of America.

MOORE, Circuit Judge.

Four defendants, Virgil D. Dardi, Robert B. Gravis, Charles Rosenthal and Charles Berman, appeal from judgments of conviction that followed a jury verdict in which they were found guilty of unlawfully participating in the distribution of unregistered shares of United Dye and Chemical Corporation stock. Appellant Dardi was President and a Director of United Dye, a company long traded on the New York Stock Exchange. Appellants Berman, Gravis and Rosenthal were broker-dealers who dealt in the sale of stock in the over-the-counter market.

Appendix A

The Indictment

The indictment, which named thirty-three defendants and seventeen co-conspirators, contained thirty counts arranged in three general categories: Conspiracy (Count 1), market manipulation (Counts 2-5) and sale of unregistered securities (Counts 6-30). Because of severances and pleas of guilty, of the thirty-three defendants only the four appellants and one corporate defendant participated in the trial to its completion.[1]

Count 1 charged a conspiracy, 18 U.S.C. § 371, by Dardi, Berman, Gravis, Rosenthal and others illegally to sell unregistered United Dye stock to the public in violation of specified sections of the Securities Act of 1933 (15 U.S.C. §§ 77e(a), 77e(c), 77q(a), 77x), the Securities Exchange Act of 1934 (15 U.S.C. §§ 78i(a), 78j(b) and 78ff(a)), Rules and Regulations promulgated under both acts by the Securities and Exchange Commission and the

1. Prior to trial, the following defendants were severed: I. Vincent Powell, Michael Kramer, Murray Porter, Edward Stone, Vincent P. Barry, Oscar L. Gould, Jacob Klein, Albert Wood Moore, Garry Hochman, Robert Allen and Charles Landeau, all characterized by the Government as "salesmen." Defendants Louis Levin and G. F. Rothschild, Inc., were also severed prior to trial.

Four defendants entered pleas of guilty to portions of the indictment prior to trial: McGrath Securities Corporation (Counts 1, 6, 7, 8, 9, 17, 18 and 19), I. F. Stillman Inc. (Counts 1, 15, 27 and 28), Sidney Barkley (Count 1) and Irving Frank Stillman (Count 1).

Nine defendants pleaded guilty during trial: Samuel S. Garfield (Count 1); Allen K. Swann (Count 4); Allard Roen (Count 1); Herman W. Brann (Counts 4 and 5); Irving Pasternak (Counts 1, 6, 7, 8, 9, 20, 24, 27, 29 and 30); Garland L. Culpepper, Jr. (Counts 1 and 10); Rockwell Securities Corp. (Counts 1 and 10); Joseph Herbert Lederer (Count 1) and J. H. Lederer & Co. (Counts 1 and 30). Cornelius DeVroedt was severed due to illness; thereafter, Cornelius DeVroedt, Inc. entered a plea of *nol contendere* to Counts 1, 24, 25 and 26.

Mail Fraud Statute (18 U.S.C. § 1341), and to defraud the United States by impeding the functions of the Securities and Exchange Commission (SEC). The method used to obtain control of United Dye, the use made of other companies such as Franklin County Coal Corporation and Handridge Oil Corporation, the illegal sale of unregistered stock and the illegal market manipulations were set forth in twelve detailed paragraphs and subparagraphs. The thirty-two overt acts alleged in the indictment included specific meetings and letters. Counts 2, 4 and 5 charged Dardi, Garfield, Pasternak and others with illegally pegging and stabilizing the price of United Dye stock on the New York Stock Exchange. In counts 6 through 30 the broker-dealers, Rosenthal, Berman, Gravis and others, were charged with the use of the mails in connection with specific sales of United Dye stock.

Each appellant was convicted on the first count. Dardi was convicted on each three market manipulation counts under 15 U.S.C. §§ 78i(a) (2), (a) (6) and 78ff(a) and 18 U.S.C. § 2. Berman, Gravis and Rosenthal were convicted on counts charging the illegal sale of unregistered United Dye stock in violation of 15 U.S.C. § 77e(a) (1), 77x and 18 U.S.C.A. § 2.[2]

I.

Outline of the Evidence

As an overture to an analysis of the many legal and factual grounds urged for reversal, it is necessary to

2. The jury found Rosenthal not guilty on Count 15, Berman not guilty on Counts 14, 24, 25 and 26 and Gravis not guilty on Count 16. Defendant R. B. Gravis, Inc. was convicted on Counts 1 and 29, but found not guilty on Count 16.

describe in brief outline the factual background against which the case must be viewed. The Government's case was constructed principally on the testimony of Alexander L. Guterma, the Chairman of the Board of United Dye and the central figure in the complex chain of transactions which he described to the jury. The Government alleged, and the jury must have found, the existence of a single multi-stage conspiracy which had as its central purpose distribution to the public of unregistered United Dye stock. In the preliminary stages of the scheme, the conspirators gained control of United Dye and created a corporation with which it was later merged, Handridge Oil Company. As a result of the Handridge-United Dye merger, the conspirators obtained 575,000 "control" shares of United Dye stock. Shortly thereafter, through manipulation of the market on the New York Stock Exchange and misleading and fraudulent statements to customers the shares were sold in the over-the-counter market without the registration required by the federal securities laws. A résumé of Guterma's testimony on direct examination supplies most of the details on which these ultimate facts were grounded.

Preparations for the Merger of United Dye and Handridge Oil

In June of 1955, Guterma joined defendants Samuel Garfield and Irving Pasternak in their efforts to acquire the Franklin County Coal Corporation. Guterma testified that his partnership with Garfield and Pasternak was for the purpose of merging Franklin, then owned by John and Clint Murchison, Jr., with a company listed on either the

New York or American Stock Exchange and then selling the stock of the listed company as thus acquired. Franklin's two major assets, coal lands in Illinois, long inactive, and an oil pipeline in Wyoming, had been unable to muster a profitable return for several years. To effect the sale, Garfield and Pasternak gave their promissory note for $510,000 as the full purchase price, leaving the stock with the Murchisons as security. The only cash to change hands at this point was a loan of $800,000 from Garfield, Pasternak and Guterma to Franklin to redeem a like amount in mortgage debt to the Murchisons.

Since the Franklin stock was pledged with the Murchisons, and would be unavailable for a merger with a more substantial corporation, Guterma, Garfield and Pasternak found it necessary to improvise on their original plan. To this end Swann, their attorney, formed Handridge Oil Corporation to which Garfield and Pasternak conveyed their interest in Franklin. In exchange, the 500,000 shares of Handridge were transferred to Swann, "in trust" for the three partners. Guterma testified, however, that subsequently much of the Handridge stock was held by nominees, to disguise Guterma's, Garfield's and Pasternak's status as "control persons" under the 1933 Securities Act.

Meanwhile, Guterma had become acquainted with Dardi, already an officer and director of United Dye, and in the latter part of June, 1955, had agreed to purchase a block of 38,500 shares of United Dye stock through Dardi at ten dollars per share. There were at this time about 168,000 shares of United Dye outstanding. Soon thereafter, Guterma distributed about two-thirds of the 38,500 shares as follows: Pasternak, for himself and Garfield, bought 12,000 shares; 1,000 shares each went to co-con-

spirators Robert Eveleigh, a Guterma aide, and Robert Leonhardt, owner of McGrath Securities Corporation, a defendant brokerage house which was later to sell United Dye shares; and Dardi retained an option, later exercised, to buy 6,500 shares to complement the 17,700 shares he already held. By early September, 1955, Guterma had been elected Chairman of the Board, Dardi President, Eveleigh Treasurer, and Alexander Timm, one of Dardi's associates, Assistant Secretary.

While Guterma was establishing himself at United Dye, he discussed with Dardi the prospects of a merger between United Dye and Franklin County Coal. A committee of United Dye Directors, including Dardi, was appointed to look into the proposal. Originally, Guterma represented Franklin in the negotiations with the committee but when he became a director, he negotiated on behalf of United Dye with Pasternak and Swann. The proposed merger was also discussed with the Committee on Stock Lists of the New York Stock Exchange, which eventually granted United Dye's application to list the additional shares to be issued in the merger. In early December 1955, a merger agreement was executed under which United Dye was to issue 575,000 shares of its stock (then selling at approximately $30 per share) in exchange for the 575,000 shares of Handridge. Handridge was required to have at the closing, in addition to unencumbered Franklin shares, $750,000 in cash. Guterma testified that this $750,000 actually came from the sale of 75,000 Handridge shares to, among others, United Dye directors, including Dardi, who concealed their ownership through an escrow agent.

Appendix A

To Guterma the then inflated price of United Dye stock was not conducive to execution of the merger, and he discussed the situation with Dardi and Hyman Lehrich, also an officer and director of United Dye, as well as with Garfield and Pasternak in October 1955. To meet the problem without running afoul of the securities laws governing the sale of control stock, Guterma and Pasternak entered into a series of "loan" agreements with various "borrowers," in fact nominees, who immediately sold the "borrowed" stock reaping substantial profits in the process.' The Government also adduced evidence that coincident with the sales of Guterma and Pasternak, Dardi through nominees disposed of the 6,500 shares he had purchased from Guterma under the June 1955 agreement. The cumulative effect of the sale of substantially the whole 38,500 share block achieved the desired result of driving the price of United Dye from a high of $38 per share in November 1955 to approximately $16 on May 1, 1956 when the merger was to close.

Effectuation of the Merger of United Dye and Handridge.

The merger agreement between United Dye and Handridge stipulated that Handridge was to own, at the date of the merger, the Franklin stock, then pledged with the Murchisons as security for Garfield and Pasternak's $510,000 note, free and clear. Garfield And Pasternak, according to Guterma, did not have the funds to pay off the note. Therefore, Guterma, Dardi, and Lehrich, in April 1956 caused the merger agreement to be modified to delete the free and clear requirement and to provide that United Dye would assume the note and that Garfield and

Pasternak would pay United Dye $510,000 plus the $9,000 interest that had by then accrued.

Bon Ami

About this time Dardi learned that 63,000 shares of the Bon Ami Company, which had over $3,000,000 in liquid assets, were available for purchase. By May 1, 1956 Dardi had executed an agreement with certain Bon Ami stockholders which provided for United Dye's payment of $1,350,000 (to be borrowed from Guterma's F. L. Jacobs Corporation) and the delivery of its $350,000 promissory note in exchange for 63,000 Bon Ami shares.

Guterma testified that control of Bon Ami was acquired to enable Garfield and Pasternak to satisfy the $519,000 obligation owed by them to United Dye. Moreover, his testimony as well as other evidence on this phase of the case, could well support the conclusion that the Bon Ami treasury after the merger was used to satisfy the obligations incurred by United Dye in the very process of acquiring its 63,000 Bon Ami shares. To substantiate Guterma's testimony, the Government introduced evidence of various "loop" transactions involving Garfield and Pasternak and, as Directors of Bon Ami, Guterma and Dardi. Immediately after the merger, the Bon Ami Executive Committee formed a subsidiary, B. A. Royalties, Inc., which was used as a conduit for transferring $860,000 of Bon Ami funds to Garfield and Pasternak. Out of the $860,000 Garfield and Pasternak, by check back dated to May 1, 1956, paid $519,000 to United Dye in payment of their note to the Marchisons; and, at the same time, they transferred $140,000 to United Dye, purportedly as a loan. Subsequently, so that Bon Ami would be repaid, Bon Ami trans-

ferred to Diversified Oil & Mining Corporation (D. O. M.), recently organized and controlled by Guterma, Garfield and Pasternak, $1,250,000 in exchange for a similar amount in D. O. M. debentures secured by D. O. M.'s properties. The same day, D. O. M. transferred $915,000 to Garfield and Pasternak, purportedly in partial payment for oil properties, although those properties had been previously pledged to Bon Ami, and $250,000 to United Dye as a loan. From the $915,000 received from D. O. M., Garfield and Pasternak repaid the original $860,000 loan from Bon Ami. According to the Government, the final step in this series of transactions was the payment by United Dye of the obligations it had incurred in its purchase of Bon Ami, $1,700,000.

The Garfield and Pasternak Guarantee

Under the United Dye-Handridge merger agreement, Garfield and Pasternak had guaranteed that the Franklin pipeline would, for each of the years 1956 and 1957 receive a minimum profit before amortization and depreciation of $1,200,000. As security, Garfield and Pasternak pledged 85,000 United Dye shares they had received in the merger to United Dye. Less than two months after the merger, Guterma recommended to the United Dye Board that this guarantee be waived in return for a cash payment of $800,000. As it happened, according to Guterma, Garfield and Pasternak transferred to United Dye $450,000 in cash (obtained partially from United Dye and partially from D. O. M.) and 115,000 shares of D. O. M. stock, arbitrarily valued at $250,000 although actually worth only $184,000. In return, they obtained the 85,000 shares, then worth

$1,200,000, which could be sold in the forthcoming distribution.

Sales to the Public of United Dye Shares Issued in the Merger

The third objective of the Guterma-Garfield-Pasternak partnership was the sale to the public of 500,000 shares of United Dye, amounting to more than 50 per cent of the stock outstanding, acquired in the May 1956 merger. To avoid the practical and legal difficulties attendant upon the sale of such a large block on the New York Stock Exchange, the three partners had agreed to sell the shares in the over-the-counter market. It was at this point, during the summer of 1956, that the broker-dealers commenced their operations. While the United Dye stock was being stabilized artificially on the Stock Exchange, the broker-dealers (enlisted by Guterma), primarily by way of hard-selling long distance telephone calls and misleading tout sheets (so-called "boiler room" tactics), sold the stock to the public, knowing that no registration statement had been filed. The firms involved, including I. F. Stillman, Inc. (appellant Rosenthal), R. B. Gravis, Inc. (appellant Gravis) and G. F. Rothschild & Company (appellant Berman) were to be paid a fifteen per cent commission plus one dollar in cash for each share sold.

Stabilizing the Market

The success of the telephone sales campaign depended in large measure on the price at which United Dye was being traded on the Stock Exchange. To maintain the price, the shares sold initially over-the-counter had to be

absorbed when offered on the Exchange. Consequently, Guterma made the necessary "pegging" arrangements with his aid, Hughes, defendant Brann, appellant Rosenthal, and defendant Sidney Barkley, Rothenthal's associate in I. F. Stillman & Co.

Before the merger, Guterma had instructed Hughes to watch the market price and to purchase any large amounts of United Dye stock for which there was no demand. Hughes complied by opening several brokerage accounts and purchasing in the name of relatives, friends and nominees. Hughes' efforts proved inadequate, however, when the boiler room sales began in earnest. To alleviate the problem, Dardi introduced Guterma to Brann who had expressed an interest in selling United Dye shares in Europe and in North Africa where he owned a bank. Brann could take advantage of 30 per cent margin, insure the anonymity of anyone conducting a market stabilization program, and tout the stock in his bank's market letter. An arrangement was agreed upon wherein Brann was to buy United Dye stock on the New York Exchange, the margin coming from Guterma, and then to sell the stock abroad. Although the Brann arrangement eventually bogged down as a result of Brann's alleged double-dealing the net result of the stabilizing efforts of Hughes, Brann, Rosenthal and Barkley proved successful.

The sales to the public and the accompanying market manipulation, which lasted until early November 1956, completed the venture which Guterma, Garfield and Pasternak had undertaken a little over a year earlier, and in October they met at Clare, Michigan to discuss dividing the spoils amongst themselves. In April 1957 Guterma resigned from United Dye and began to sell the 83,000

shares he then owned. Dardi, according to Guterma, learned of these sales and, after reminding Guterma of Guterma's agreement to give him first preference, purchased 40,000 shares from Guterma at the then market price of $7.

II.

SUFFICIENCY OF THE EVIDENCE

Because a large portion of the errors asserted by appellants are bottomed on disputed questions of fact and sufficiency of proof, it is appropriate to advert to certain long established principles of appellate review. A jury of twelve has heard all the testimony, explanations of the meaning of a vast number of exhibits, and the exhaustive summations of counsel, and has been instructed on the applicable legal rules. Their verdict, after due consideration, was that appellants were, on the facts and the law, guilty of substantive crimes and of conspiracy. It was within the exclusive domain of the jury to choose between competing inferences of fact. United States *v.* Grunewald, 233 F. 2d 556, 563 (2d Cir. 1956) rev'd on other grounds, 353 U. S. 391, 77 S. Ct. 963, 1 L. Ed. 2d 931 (1957). On appeal the evidence must be considered in a light most favorable to the Government. United States *v.* Tutino, 269 F. 2d 488, 490 (2d Cir. 1959). Moreover, microscopic dissection of bits and pieces of evidence when laid out in a cold record overlooks the truism that "logically the sum is often greater than the aggregate of the parts, and the cumulation of instances * * * may have a probative force immensely greater than any one of them alone." United States *v.* White, 124 F. 2d 181, 185 (2d Cir. 1941).

Appendix A

Substantive Counts (the Broker-Dealers)

The broker-appellants' convictions stem from their unlawful sales of unregistered stock. They do not dispute that they sold the stock or that it was not registered; rather, they claim that they were ignorant that the stock required registration at the time. Section 5(a) of the Securities Act of 1933, 15 U.S.C. § 77e(a) sets up a general prohibition on the sale of unregistered securities with certain exemptions.[3] No exemption is provided for an "underwriter" defined by the statute[4] as any person who offers or sells a security for an "issuer." An "issuer," in

3. 15 U.S.C. § 77e(a) provides:

> Prohibitions relating to interstate commerce and the mails.
>
> "(a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—
>
> "(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or
>
> "(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale."

4. 15 U.S.C. § 77b(11) states:

> "The term 'underwriter' means any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commission. As used in this paragraph the term 'issuer' shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer."

turn, is defined in terms of "control." Since the evidence clearly establishes that Guterma, Garfield and Pasternak were in "control," and since the broker-appellants sold for one or more such "issuers," each was an "underwriter" under the Act. See United States *v.* Crosby, 294 F. 2d 928, 939-40 (2d Cir. 1961), *cert. denied sub nom.* Mitteiman *v.* United States, 368 U. S. 984, 82 S. Ct. 599, 7 L. Ed. 2d 523 (1962). Through this circuitous route it is apparent that the crucial issue as to the broker-dealers' guilt is whether they knew that they were selling for a "control" group. In United States *v.* Crosby, *supra*, this Court found that there was insufficient evidence that the broker-dealers "knew or should have known they were 'underwriters' in terms of the 'Securities Act.'" The evidentiary problem here is whether the link missing in Crosby has been supplied.

Berman

Berman has energetically undertaken the task of explaining away all the undesirable inferences that can be drawn from the evidence adduced against him. A similarly meticulous analysis of various transactions and meetings was urged to the jury. We set out here a few of the facts from which the jury might have justifiably chosen to disregard Berman's explanations of his conduct. Berman came to Guterma and asked how many shares of United Dye were available and what the compensation was. He was told that about 150,000 shares "could be sort of held for him on an option basis." When Berman pressed for more, he was informed that any amount he could sell would be forthcoming and that "there was in excess of 200,000 to 250,000 available." When Berman asked of

compensation, Guterma said that brokers were getting 15 per cent by check and $1 in cash per share. Guterma also told him that the stock should be sold for a specific amount —at the closing New York Stock Exchange price. There was also evidence tending to show that six "vendor" letters, addressed to Garfield, Pasternak, Swann and three others were all sent instead to Swann, with whom Berman dealt, and that these letters were a subterfuge. Perhaps even more damaging was Guterma's testimony that, when Berman expressed concern about the drop in United Dye price, Guterma replied that all efforts were being made regarding market stabilization and that Berman should not be disturbed about it.

Berman argues that it was only logical to ask the chief executive of a corporation if large blocks of shares were available for sale; that in discussing market price with Guterma he hoped that as Chairman of the Board Guterma would influence the market through legitimate corporate actions; and that the only inference that can be drawn from the "vendor" letters is that copies were sent to Swann in his representative capacity. Whatever the various inferences it *might* have drawn, the jury heard Berman's explanation of his conduct and discredited it. The evidence presented describing the circumstances of Berman's participation in the distribution is sufficient to support the jury's conclusion that he knew that his sales were for a control group.

Berman also asserts his good faith reliance on legal opinions that the stock was tradeable without registration, as did the broker-dealers in United States *v.* Crosby, supra. The Crosby case makes it clear, however, that reliance on the opinion of counsel is but one consideration

which may be persuasive in the jury's determination of the defendant's state of mind. Among other factors which the jury could consider as going to Berman's good faith reliance on legal advice was the fact that the letters expressing the opinion that the stock could be sold without registration specifically made the assumption that the sales were not being made for "control" persons. And, as pointed out, the jury could have inferred that when these opinions were rendered Berman knew that he was dealing with control persons.

Gravis

Gravis first expressed his interest in selling United Dye to Hughes, who arranged a meeting with Guterma. Guterma told Gravis that the amount available of shares was in excess of one-half million, and assured him that these shares would not be sold on the Exchange so as to undercut the price. Guterma further informed Gravis that he could acquire shares for distribution, and that "the brokers" were receiving 15 per cent commission by check and $1 in cash. There was also evidence that Gravis was one of the brokers who sent periodic "confirmations" of sales to Hughes at United Dye. Finally, there was evidence that Gravis made false statements to SEC Investigator Pitchardo from which the jury might have concluded that Gravis knew full well that his sales were unlawful and that Guterma was in a control position.

Rosenthal

Guterma's testimony alone provides a sufficient basis on which the jury could have decided that Rosenthal knew

he was selling for Guterma and his control group. Guterma told Rosenthal that he (Guterma) and his "associates," Garfield, Pasternak, Swann and others, wanted to sell United Dye shares in the over-the-counter market. He further informed Rosenthal that the group controlled a total of approximately 550,000 shares and that "substantially all of these shares would be sold." In addition, testimony of Barkley, Rosenthal's former partner, was that he and Rosenthal had actively engaged in market "pegging" while the United Dye shares were being retailed, under Guterma's supervision.

The Conspiracy Count

The broker-appellants make the complaint that the Government failed to prove the single conspiracy alleged in Count 1; that the proof showed that any conspiracy to sell securities to the public was independent of a separate and prior conspiracy involving the creation of the shares and their distribution to the co-conspirators and nominees. The prejudicial effect of the mass of evidence introduced as to the activities of Guterma and his "executive" group, it is argued, requires reversal on the substantive counts as well as the conspiracy count.

As was recently said in United States v. Crosby, supra, at 945 of 294 F. 2d, "[w]hether a scheme is one conspiracy or several is primarily a jury question, since it is a question of fact as to the nature of the agreement." In the case at bar the jury was so instructed.

There was abundant evidence to show the complicity of Guterma, Garfield and Pasternak, among others, in one plan consisting of a progression of carefully related

transactions which had as its ultimate purpose the sale to the public of unregistered stock. Indeed, Guterma testified that this was precisely what his venture with Garfield and Pasternak was all about. But it is not fatal that the broker-appellants were not shown to have been aware of each part of the unlawful plan. See United States *v.* Benjamin, 328 F. 2d 854 (2d Cir. 1964); United States *v.* Crosby, supra at 945 of 294 F. 2d; United States *v.* Agueci, 310 F. 2d 817 (2d Cir. 1962), cert. denied, Guippone *v.* United States, 372 U. S. 959, 83 S. Ct. 1013, 10 L. Ed. 2d 11 (1963). It is only necessary to show that appellants knew of the conspiracy and that they associated themselves with it. United States *v.* Bentvena, 319 F. 2d 916, 928 (2d Cir. 1963), cert. denied [Ormento *v.* U. S., Pietro *v.* U. S., Fernandez *v.* U. S., Panico *v.* U. S., 375 U. S. 940, 84 S. Ct. 345, 11 L. Ed. 2d 271; Galante *v.* U. S., 375 U. S. 940, 84 S. Ct. 346, 11 L. Ed. 2d 271; Loicano *v.* U. S., 375 U. S. 940, 84 S. Ct. 353, 11 L. Ed. 2d 272; Mangino *v.* U. S., 375 U. S. 940, 84 S. Ct. 354, 11 L. Ed. 2d 272; Scirenammano *v.* U. S., 375 U. S. 940, 84 S. Ct. 355, 11 L. Ed. 2d 272; Mirra *v.* U. S., 375 U. S. 940, 84 S. Ct. 360, 11 L. Ed. 2d 272]; United States *v.* Aviles, 274 F. 2d 179 (2d Cir. 1959), cert. denied, sub nom. Genovese *v.* United States, 362 U. S. 974, 80 S. Ct. 1059, 4 L. Ed. 2d 1010 (1960).

We must conclude that there was sufficient evidence from which the jury could find that the broker-appellants knew that Guterma represented a control group acting in concert for the purpose of selling to the public unregistered stock. Upon the facts here, the sufficiency of the proof on the conspiracy count is bolstered by the determination of the adequacy of proof on the substantive

count. See United States *v.* Crosby, supra, at 940 of 294 F. 2d.

III.

Conduct of the Trial

Dardi, apart from points dealing with claims of specific evidentiary errors, asserts that he was denied a fair trial (1) because of the trial court's failure to grant proper and timely pre-trial production of documents and a bill of particulars; (2) because of the extended duration of the trial and the court's toleration of "colloquy"; (3) because of the charge; and (4) because of unfair and discriminatory treatment by the trial court.[5]

Pre-Trial

Probably no experienced trial counsel has ever commenced a trial feeling that every necessary item had been fully and adequately prepared and that nothing remained to be done during the trial. If so, it is an experience enjoyed by very few. The usual pattern, particularly in the complicated and protracted case, is to spend most of the time after daily recess preparing for the morrow. And certain it is that trial counsel, if worthy of the title, never are satisfied that all possibilities of law and fact have been explored and that all the arguments essential to victory have been made. Limitations of time, space and the finite mind apply even to lawyers and it is against the background of this unfortunate but actual limitation that this trial must be viewed.

The indictment was filed on July 14, 1961. It was by no means in skeleton form. The conspiracy was alleged in

5. The other appellants join in these contentions.

detail and thirty-two overt acts were set forth. The particular statutes claimed to have been violated were set forth. The nature of the conspiracy, namely, the sale of unregistered stock, the riggings of the market and the fraudulent sale to the public were alleged not in generalities but with reference to the specific means used for these purposes. The substantive counts dealing with market manipulation and sale were equally definite. Surely these appellants were adequately informed of the charges against them.

They complain, however, that they were not allowed sufficient pre-trial discovery and inspection and a detailed bill of particulars. In September 1961 defense counsel filed their motions for discovery and particulars. In December a single judge was appointed before whom all matters were to be heard. Early in February 1962 the court denied the motions. This denial, however, did not cut off the defense from information. On February 8, 1962 the Government served an eight-page bill of particulars and offered to make available some sixty-eight categories of documents. Pre-trial conferences were held during February with the not unsual result of the Government claiming that it was being over-liberal in its disclosures and the defense contending either that it was not enough or too much to be encompassed before the commencement of the trial. It was at this point that the trial court, faced with the necessity of commencing the trial at some time, made the suggestion that defense counsel could prepare as the case went along. No inference can be drawn from this remark that defense counsel approached the day of trial completely unprepared and that the trial court callously told them to prepare as they went along

They had been aware of the charges against their clients for some eight months. Their motions, the pre-trial conferences, the "minutiae" in the Government's bill of particulars, of which they now complain, all refute their present claim.

Even after the commencement of the trial (February 27, 1962) defense counsel had many opportunities for further preparation usually not afforded in the average trial. The Government's case was presented in substantial part through Guterma whose testimony commenced on March 9, 1962. A week's adjournment, caused by a defendant's illness, occurred between March 13th and 20th. The first occasion for cross-examination by any of appellant's counsel did not arise until April 16th. Investigation into each phase of his testimony surely could have been made in this interval.

Lastly and most determinative is the fact that Dardi makes no showing on this appeal that the facts would have been other or different had he had an additional year or six months in which to prepare. Nor does he point even now to any facts which could have been developed which would have so radically changed the fact picture that, in effect, a new trial should be granted.

The Duration of the Trial

All the evils attendant to a long trial (February 27, 1962 to January 31, 1963) are stressed by appellants: the possibility of the jury being unable to remember the testimony given in the earlier stages of the trial, the jury's impatience in being deprived of the opportunity to attend to their own affairs, their expressed resentment at short court sessions, abandonment of any summer vaca-

tion plans and their restlessness over the long periods involved in court-counsel colloquy.

There can be no scale by which to measure the proper length of a trial. See, e. g., People *v.* Clemente, 8 N. Y. 2d 1, 200 N. Y. S. 2d 625, 167 N.E. 2d 307, cert. denied, 364 U. S. 923, 81 S. Ct. 289, 5 L. Ed. 2d 262 (1960). For the reasons specified and many others, long trials, should be avoided. However, a multi-defendant stock fraud case, as involved as this one, usually necessitates delving into many financial transactions. Those who participate in such transactions do not supply the government with a simple and clear picture. The picture, even as on a jig-saw puzzle, only comes into vision by the assembling of hundreds of curiously shaped parts, each piece seemingly having no identity until it is fitted into and made a part of the whole. Every defendant can claim and with much plausibility that his own role may have become besmirched by having been tried with others more guilty than he—and naturally every defendant feels that he is the least guilty, if guilty at all.

Two legal principles, however, must be honored. Those entrusted to make the laws have placed the crime of conspiracy on the books and it has not been repealed despite the fact that throughout the ages it has been largely responsible for multi-defendant trials and the admission of evidence otherwise inadmissible. Nor does any statute exist nor are there court decisions which declare a trial of more than one defendant at a time to be reversible error.

In any financial scheme of magnitude involving many persons and many companies it is but normal expectancy

that there be many participants. If the Government honestly believes (and there is no proof here to the contrary) that many defendants have played a part in the conspiracy they may be—and probably should be—joined as defendants. Again a long-established legal principal contributes to this joinder, namely, that a defendant need not be a member of the conspiracy from its inception to its termination. Defendant co-conspirators in many instances need not even know their fellow conspirators or the particular part they are playing. If the indictment of the many original defendants contributed to the length of the trial, this fact does not constitute reversible error.

Colloquy

Appellants argue that they were deprived of a fair trial because of the extensive colloquy engaged in between court and counsel. They point to certain statistics, inserted in the record by the court itself, that after over eight months of trial the 19,544-page transcript contained 9,814 pages of recorded testimony, 892 pages related to ancillary matters and 8,838 pages devoted to colloquy—practically 50 per cent testimony, 50 per cent colloquy. The trial was eventually to consume over eleven months and the transcript to extend over 26,000 pages.

By definition, colloquy is mutual discourse. In any litigation, but particularly where many defendants and many counsel are assembled, colloquy is indeed mutual and can, unless controlled, become overly extensive. The Dardi brief contains a twenty-four page analysis of the subject matter of the more extended colloquies. Each

topic was related to some point, substantive or procedural, which one or more counsel believed to be of importance to his cause. The trial court was undoubtedly motivated by a desire to obtain the correct answer and to give counsel the benefit of expressing their views. However, is the trial transcript the place to have recorded the extemporaneous legal philosophies of counsel, philosophies frequently tinged by the exigencies of the moment and the character of the testimony sought to be admitted or excluded? Would it not be better to insist that trial counsel insofar as possible be prepared to justify their positions in written memoranda submitted to the court? The myriad of legal points which could be conjured up by resourceful counsel, if debated on the record in a long and complicated case such as this, would result in a legal treatise not unlike a hypothetical *Corpus Juris Tertium*. Using the statistics submitted to us, since half of the record in eight months was devoted to matters other than testimony, the jury was subjected to four months of enforced attendance at a debating contest. This is not to say that on occasion a brief statement of the grounds for objection or the reasons for the admission or exclusion of evidence may not be helpful to court and opponent but the dictation by counsel on the record of treatises tantamount to Law Review articles should be avoided.

Except for unduly protracting the trial, and we have already determined that length *per se* does not create reversible error, the colloquy itself does not disclose material of a prejudicial nature. Furthermore, the blame, if blame there be, must be shared by the court and all counsel. But this is not to say that a tighter rein by the Judge would not have resulted in a materially shorter

trial. We have already said that the court has wide discretion in adopting methods which will expedite a trial and that there are occasions when it is wise for this discretion to be exercised. See United States *v.* Agueci, supra, at 841 of 310 F. 2d.

The Trial Court's Charge

1. Summation of "Contentions"

After an eleven months' trial, the trial court apparently believed that it would be of aid to the jury to summarize the facts. This summary occupied the first day of the two-day charge. Appellants attack the court's review of the parties' "contentions" as a distortion, more specifically, that they were not defendants' contentions but rather that "they were the prosecution's contentions of defense 'contentions.'" Only a careful analysis of the charge itself supplies the answer to the accusations that it was not impartial, that it was unfairly balanced, unfairly presented and unfairly emphasized or de-emphasized the positions of the defendants. To set forth any detailed refutation of these charges might well require a re-statement of the court's 450-page charge. Any such procedure would only add needlessly to the ever-expanding law reports. The conclusion from this court's analysis is that the charge was fair and that no reversible error can be attributed to the trial court's review of the facts or "contentions."

2. Legal Errors in Charge

In addition to the attack on the trial judge's summary of "contentions" in the charge, appellants assert that the charge incorrectly stated the law in various re-

specs. While specific sentences as excised from the overall context may have been unfortunate, we think it clear that when viewed in its entirety, the charge correctly stated the law.

Appellants claim that the trial court's instructions on the issue of appellants' guilty knowledge and criminal intent as to the substantive counts was tantamount to directing the jury to bring in a guilty verdict. They stress particularly the statement that in proving that a defendant acted knowingly and wilfully it was not necessary for the defendant to know that he was breaking "any *particular* law or any *particular* rule" (emphasis added); that the jury might consider the amount of profits made on a certain transaction and whether appellants had a pecuniary or financial interest in the outcome of the transactions.

While these statements taken separately may seem misleading, we believe that this portion of the charge, read as a whole, adequately informed the jury of the government's obligation to prove guilty knowledge. The court said: "An act is wilful if it is done knowingly, deliberately and with an evil motive or purpose. * * * [t]he significant fact is the particular defendant's state of mind." In its context the statement that the defendants need not have known they were breaking "any particular law" signified that they must be shown to have known their actions were illegal even if they did not know exactly which statute they violated. The court then suggested criteria by which to evaluate the circumstantial evidence bearing on intent. Incriminating inferences, it suggested, might be drawn from documents which did not accurately depict the transactions they related to, from documents "made up, if you so find, to conceal what you regard as the actual facts in

the transaction," from the use of dummy nominees and "of exchange checks to disguise the payment of money." Finally, in discussing the defendants' contention that they were protected by their reliance on legal opinions, the court charged that reliance on legal advice did not always constitute a complete defense; otherwise

> "regardless of the consciousness of wrongdoing on his part and perhaps on the part of his legal advisor, the advice of counsel would operate to confer immunity from punishment. Such is not the case.
>
> "However, if a man honestly and in good faith seeks advice of a lawyer as to what he may lawfully do, and if he fully and honestly lays the facts before his counsel and in good faith honestly follows that advice, relying upon it and believing it to be correct, and only intends that his acts shall be legal, he could not be convicted of a crime which involves wilful and unlawful intent even if the legal advice that he received was erroneous.
>
> "But, on the other hand, no man can wilfully and knowingly violate the law and attempt to excuse himself from the consequences by arguing that he followed the advice of counsel."

Furthermore, this portion of the charge on requisite criminal intent[6] as to the substantive counts was supplemented by the statement made a few minutes earlier in the charge on the conspiracy count that "a knowing participation in

6. There is some dispute whether knowledge of illegality of sale need be shown to satisfy the "wilfulness" requirement of the Securities Act if the seller knew that the stock was control stock and that it was not registered. See Loss, Securities Regulation 1686, 1309 and Supp. 1962 (discussing United States v. Crosby, supra). Since the charge was adequate on either view, we need not consider whether it gave the defendants an advantage to which they were not entitled.

a scheme having as an objective the knowing violation of the Securities Laws or the knowing violation of the Mail Fraud statute" was required.

The court properly instructed the jury that the Rule 133 "merger" exemption from the registration requirements did not apply to a subsequent resale of the stock acquired in the United Dye-Handridge merger. 17 C.F.R. § 230, 133; see United States *v.* Crosby, supra, at 939 of 294 F. 2d; S. E. C. *v.* Culpepper, 270 F. 2d 241, 247-48 (2d Cir. 1959). Appellants assert that the trial court erred in refusing to charge the jury that it might consider the extent to which the application of Rule 133 was unclear in 1956. However, it is at best doubtful that appellants were entitled to such a charge, since there was no evidence that they in fact had been misled by an incorrect analysis of this exemption. Indeed, the opinion letters relied on by Berman correctly advised that the stock was freely tradeable only if the seller were not a control person. In any event, the trial court did remind the jury of appellants' contention that "they acted on the advice of lawyers, that they were told that Rule 133 exempts the stock, that they didn't know that the stock had to be registered."

We have carefully considered the other contentions pertaining to legal errors in the charge and have found them to be without merit.

General Unfairness and Admission of Prejudicial Evidence

Dardi asserts that the trial court's rulings evidenced unconscious discrimination against defendants, the cumulative effect of which requires reversal; in the alternative,

he points to various rulings which by themselves are said to require reversal. The innuendo that the trial court did not carry out its judicial obligations is completely unfounded.

1. Shawano and Bon Ami

Much of Dardi's criticism of the integrity of the trial can be attributed only to the nature of the conspiracy itself. For example, Dardi contends that admission of evidence concerning Bon Ami and Shawano Development Corporation resulted in prejudicial error requiring reversal. On direct examination, Guterma was allowed to tell of a prior conviction under the Securities laws involving both Bon Ami and Shawano stock. See United States *v.* Aronson, 319 F. 2d 48, 51 (2d Cir.), cert. denied, 375 U. S. 920, 84 S. Ct. 264, 11 L. Ed. 2d 164. Thereafter, transactions involving each corporation were put before the jury. Thus, Guterma testified that $150,000 of the $450,000 which Garfield and Pasternak transferred to United Dye in exchange for the release of the "pipeline" guarantee was channeled through Kent Window Corporation, a subsidiary of Shawano. Bon Ami was scrutinized more thoroughly. The liquid assets of Bon Ami were thus shown to have been used to satisfy the $519,000 Murchison obligation and to enable United Dye to repay the short-term debt incurred when Bon Ami was acquired. In each instance the transaction was relevant to show the close relationship between Guterma, Garfield and Pasternak and the mechanics by which the major purpose of the conspiracy was effected. And, Dardi's cooperation with and proximity to the "executive" group during these dealings was highly relevant to the issue of criminal intent and

knowing complicity in the fraud and conspiracy." United States *v.* Crosby, supra, at 946 of 294 F. 2d.

2. The Deputy Marshal Incident

Appellants urge that the trial court erred in denying a mistrial when a Deputy United States Marshal, assigned to escort Guterma during court appearances, engaged in a brief conversation with a juror. The trial court carefully investigated the incident, determined that the juror had not been influenced, and gave cautionary instructions. Under the circumstances, the court's denial of the motion for mistrial was not an abuse of discretion.

3. The Mayers Letter and Stock Purchasers' Testimony

Appellant insist that there was error in allowing the jury to examine the "Mayers" letter, portions of which they characterize as anti-Semitic and vulgar. Since the offensive language did not refer to any of the appellants, it is difficult to see how prejudice resulted from this incident. Similarly, there is no merit in the contention that appellants were prejudiced by the testimony of the unfortunate purchasers of United Dye stock. Such testimony was relevant to numerous counts of the indictment.

4. Pleas of Guilty During the Trial

At the commencement of the trial, there were twelve individual defendants. After three weeks of trial, three pleaded guilty, including the defendant Garfield who had been closely associated with Guterma in the financial

schemes under attack. Some three months later another defendant, Brann, announced his intention to enter a guilty plea and subsequently became a Government witness. In July 1962 Pasternak, also prominently involved with Guterma, pleaded guilty. Other guilty pleas were entered in July and September. Although taken in the jury's absence, the jury could not have been unaware of these pleas. Appellants argue that under these circumstances a fair trial was impossible and that "The presumption of innocence could not have survived the parade of guilty pleas and the recitations." Dardi recognizes this court's decisions in United States v. Crosby, supra; United States v. Falcone, 109 F. 2d 579 (2d Cir.), aff'd, 311 U. S. 205, 61 S. Ct. 204, 85 L. Ed. 128 (1940); United States v. Rollnick, 91 F. 2d 911 (2d Cir. 1937), but claims that the many guilty pleas from defendants tied in to the same conspiracy seriously prejudiced the remaining defendants.

Of course, in any multi-defendant trial, there is a real danger that the admission of guilt by one defendant, particularly in a conspiracy case or one in which the defendants have acted jointly, will react unfavorably against other defendants. However, no rule of law has yet been promulgated which forbids a defendant from so pleading during trial. This court, as have courts of appeals in other circuits, has faced this problem and has held in conformity with "the federal courts [which] have uniformly held it not error, if proper cautionary instructions are given, for the jury to be informed during trial that one or more defendants have pleaded guilty, or even for the jury to be present when the pleas are entered." United States v. Crosby, supra at 948 of 294 F. 2d; see also United States v. Aronson, supra; United States v. Murray, 297

F. 2d 812 (2d Cir.), cert. denied, 369 U. S. 828, 82 S. Ct. 845, 7 L. Ed. 2d 794 (1962); United States v. Freeman, 302 F. 2d 347 (2d Cir. 1962). The instructions given by the trial court after each plea, together with its comments on this subject in the charge, met the law's protective requirements.

IV.

Specific Errors

Restrictions on Lehrich's Cross-Examination

Darsh argues that the restrictions imposed upon the cross-examination of witness Lehrich was a denial of due process of law, and in the alternative, an abuse of discretion under the federal rule of the scope of cross-examination. Lehrich was an officer and director of United Dye and was Guterma's legal adviser. He was named as a co-conspirator, but was not a defendant. On its direct case, the Government called Lehrich to give testimony concerning what the parties have characterized as the "Bender" affair. Because of the limited scope of the direct examination, the trial court refused to permit defense counsel to cross-examine on the events of 1955 and 1956.

The trial court was justified in the exercise of its discretion in limiting cross-examination to the scope of the direct. United States v. Minuse, 142 F. 2d 388, 389 (2d Cir.), cert. denied, 323 U. S. 716, 65 S. Ct. 43, 89 L. Ed. 576 (1944). Moreover, during Lehrich's cross-examination (cross-examination by Darsh's counsel covers some 250 pages of transcript), the court gave defense counsel "widest latitude to impeach Lehrich on such matters as

bias, interest, hostility, special relationship to the government, and motivation to falsify, * * *." Cf. United States v. Bentvena, supra, at 940-41 of 319 F. 2d. In any event, the trial court advised counsel that if Lehrich was called as part of the defense case, he could be examined on the events of 1955 and 1956 as a hostile witness. Having failed to avail himself of this opportunity, Dardi cannot now complain.

The "Bender" Affair

To show Dardi's "consciousness of guilt," the Government adduced testimony involving an attempt to quash a SEC investigation of United Dye through the intercession of former Senator George Bender, then Special Assistant to the Secretary of the Interior. Dardi argues that there was a failure of proof in regard to the "Bender" episode which resulted in substantial prejudice.

The "Bender" affair was alluded to first in the Government's opening and was developed in more detail during Guterma's direct examination. While Guterma's testimony on this matter was restricted to Dardi, the only participant remaining in the case, he was completely exonerated by Guterma's account, and the jury was thoroughly instructed to that effect. Thereafter, Lehrich testified in substance that he had told Dardi of a conversation he had had with Garfield in which Garfield had spoken of a commitment for $100,000 which he (Garfield) had with Bender; that Guterma was obligated for $30,000 of the commitment and Dardi for $20,000; that Garfield would like them to meet their obligations; that Dardi said that he had made such a commitment but was out of funds

at the moment but that he would talk to Garfield about it. Lehrich then told of a previous conversation in which Garfield had said that Bender might be helpful in connection with a pending SEC investigation; that Garfield said that he told Dardi, Guterma and Eveleigh of his projected trip to Washington to see Bender and that he had seen Bender.

There was no failure of proof. Lehrich's testimony, if believed, might well have been sufficient to have implicated Dardi. And in view of the trial court's adequate and specific direction to the jury that the Bender episode was being offered only as to Dardi, the conclusory claims of prejudice by the other appellants are without merit.

The Prosecutor's Comments on Summation as to Cumulative Testimony

Error is asserted in the court's refusal to grant Dardi's motion for a mistrial because of the prosecutor's statement in summation that Lehrich and Eveleigh if called would have testified cumulatively to Guterma. Apparently the prosecutor felt piqued to make this comment because of references in the summation of defense counsel to the failure of the prosecution to call them as witnesses. Counsel for the prosecution and the defense definitely should not put forward their own views as to the possible [illegible]mony of witnesses not called or tell the jury their own reasons for not calling them. However, here the jury had adequate affirmative testimony to support its verdicts and the prosecutor's comments under the circumstances do not constitute reversible error.

Appendix A

Berman's Inspection of Prior Testimony

Upon Berman's cross-examination, the Government read various questions and answers from Berman's prior testimony to the SEC and the Stock Frauds Unit of the office of the Attorney General of New York. While counsel was permitted to examine each question and answer, the court did not allow counsel to read the transcripts as a whole or those portions surrounding the questions and answers alluded to. At the completion of cross-examination, the court took it upon itself to read both transcripts "for the purpose of finding out whether there is any material or relevant qualifying or explanatory context of the questions and answers * * * used."

In United States *v.* Stone, 282 F. 2d 547, 552 (2d Cir.), cert. denied, 364 U. S. 928, 81 S. Ct. 353, 5 L. Ed. 2d 266 (1960), this Court affirmed the proposition that "when the prosecution uses testimony of a defendant before the grand jury, the defendant must be allowed to inspect it." See United States *v.* Cotter, 60 F. 2d 689 (2 Cir.), cert. denied, 287 U. S. 666, 53 S. Ct. 291, 77 L. Ed. 575 (1932). In Stone, where the court did not examine the transcript, this Court on appeal reversed the conviction on one count since it was not certain that the grand jury transcript which this Court had examined would not have been "far more effective than what the trial jury may well have regarded as an invented and self-serving explanation [of the inconsistency]." In Cotter, however, the trial court did read the transcript; and, because appellants there "chose to rest upon the bare denial of their right" and had shown no prejudice, the convictions were affirmed.

Here, as in Cotter, there is no showing of prejudice. Berman eventually did obtain a copy of his SEC testimony, although from a source other than the trial court or prosecutor, in such time that he might have used it had he so desired. As to the Attorney General's transcript, it appears from the record that Berman abandoned his requests to examine it personally. He was not entitled to the full transcript until the Government used it on cross-examination. See United States *v.* Murray, supra, at 821 of 297 F. 2d. When the request was first timely made, after cross-examination, the trial court suggested that Berman raise the matter again. Although Berman thereafter pressed for the SEC material, no further demand was made for the Attorney General's transcript. Berman expressed his appreciation to the trial court for undertaking to read the transcript, but did not inquire later as to what the trial court's reading had disclosed. Under these circumstances, it is clear that Berman seeks to take advantage of circumstances which arose due to his own inaction. His claim does not merit reversal of his conviction.

Assignment of Counsel for Rosenthal

Rosenthal argues that the trial court's failure to adjourn the trial because of his counsel's illness and its subsequent assignment of a co-defendant's counsel requires reversal. Examination of the events surrounding Rosenthal's original counsel's disability, his unsuccessful efforts to secure another counsel willing to proceed without an inordinate continuance and the arrangements finally made lead to the conclusion that the trial court's treatment of the matter was entirely reasonable under the circum-

stances, and that Rosenthal suffered no prejudice. Rosenthal had a month's notice that his lawyer's health was questionable. His original counsel was available for consultation with his replacement. His defense had not been unduly complicated. The trial court, therefore, properly refused the continuance of "at least a month and a half to two months" requested by the lawyer Rosenthal selected. Rosenthal was unable to make satisfactory financial arrangements with other counsel; consequently, the court appointed the counsel of another defendant, Cornelius D Vroedt, Inc., who had also represented the individual defendant DeVroedt prior to his severance due to illness. Rosenthal, Cornelius DeVroedt and the DeVroedt Corporation were charged with "substantially the same acts," and the court specifically found that the assignment would not give rise to a conflict of interests, but indicated that if a conflict were to arise, the appropriate precautions would be taken.

While the right to counsel is absolute, its exercise must be "subject to the necessities of sound judicial administration." United States *v.* Arlen, 252 F. 2d 491, 494 (2d Cir. 1958); and where there appears to be no conflict, the court may, in its discretion, assign to a defendant the attorney of a co-defendant. See, e. g., Danziger *v.* United States, 161 F. 2d 299, 301 (9th Cir.), cert. denied, 332 U. S. 769, 68 S. Ct. 81, 92 L. Ed. 354 (1947). Such an assignment is not, in itself, a denial of effective assistance of counsel. Since Glasser *v.* United States, 315 U. S. 60, 62 S. Ct. 457, 86 L. Ed. 680 (1942), it has been clear that some conflict of interest must be shown before an appellant can successfully claim that representation by an attorney also engaged by another defendant

deprived him of his right to counsel. See United States *v.*, Bentvena, supra at 937 of 319 F. 2d and cases there cited. During the Government's direct examination of Barkley, there arose the possibility that a conflict of interest might occur during cross-examination. At that point Cornelius DeVr. dt, Inc. entered a plea of *nolo contendere* and was severed, thus removing any possible conflict.

Rosenthal makes the further argument that the trial court improperly denied his request to put a series of "exculpatory" questions to a former salesman who had invoked the Fifth Amendment. This argument proceeds on an erroneous notion of evidence that may be submitted for the jury's consideration. An attempt to influence the jurors in the manner suggested was correctly rejected by the trial court.

Impeachment of Witness McCollom

McCollom was a defense witness called to rebut Brann's testimony. He testified that Brann's reputation in Geneva, Switzerland, for truth and veracity was "just as poor as it could possibly be." On cross-examination, the prosecution asked McCollom whether or not there was a warrant of arrest outstanding against him in Switzerland for embezzlement of $50,000. Apparently, the Government sought to show that McCollom was motivated to lie about Brann because Brann had been responsible for bringing the embezzlement charges. However, McCollom denied that an arrest warrant existed and the Government was prevented from pursuing the inquiry. Dardi relies on Michelson *v.* United States, 335 U.S. 469, 69 S. Ct. 213, 93 L. Ed. 168 (1947) in urging that the Government's

inquiry requires reversal. That case, however, concerned the use of evidence of a prior conviction after the defendant had placed his character in issue. There, the question was aimed at impeaching a witness' credibility by showing his hospitality and bias. While an arrest alone is not normally admissible to impair the credibility of a witness, the fact that it might have embittered him so as to motivate him to testify as he has may be relevant. In any event, the incident complained of, when viewed in context, was not so prejudicial as to require reversal.

Timm's Appearance Before the Grand Jury During the Trial

Reversible error is attributed to the prosecutor's acts in calling Alexander Timm, Dardi's former personal secretary and an officer and director of United Dye, before the Grand Jury. The reason advanced by the prosecutor for this action was that Timm's testimony was relevant to a possible conspiracy to obstruct justice. Dardi in turn claims that the prosecutor was only using this reason as a subterfuge to gather valuable evidence and to put pressure on Timm so as to obtain information and leads for use on the trial.

The merits of these conflicting contentions were carefully considered by the trial court in a seven-page opinion dictated into the record, denying a defense motion for a mistrial and the suppression of evidence. The trial court read Timm's Grand Jury testimony, properly recognized the principle of law that "It is improper to utilize a Grand Jury for the sole or dominating purpose of preparing an already pending indictment for trial" and came to the conclusion that under the particular facts before it (no

useful purpose will be served by outlining the Government's futile subpoena efforts) "the Grand Jury's inquiry into a possible conspiracy to obstruct justice was conceived and carried out in good faith and in a manner that did not prejudice the complaining defendant," and that Timm's Grand Jury subpoena did not constitute "the use of a Grand Jury as a subterfuge to elicit testimony for use at this trial." Under all the circumstances, this conclusion must be sustained.

The jury had full opportunity to hear the explanations advanced by capable counsel during most extensive summations in complete exculpation for appellants' every act. The four days required by the jury to reach their verdicts scarcely bespeak a snap judgment. In final analysis, the resolution of the facts and the inferences to be drawn therefrom were for jury decision. After consideration of all the many assertions of error, none of the points, individually or collectively, demonstrate that the defendants were deprived of a fair trial.

Judgments affirmed.

APPENDIX B

Judgment of Affirmance

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventeenth day of March one thousand nine hundred and sixty-four.

Present: Hon. LEONARD P. MOORE, Hon. HENRY J. FRIENDLY, Hon. IRVING R. KAUFMAN, *Circuit Judges.*

United States of America, Plaintiff-Appellee, v. Samuel S. Garfield, et al., Defendants, Virgil D. Dardi, Charles Rosenthal, Robert B. Gravis, Charles M. Berman, Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are the affirmed.

A. DANIEL FUSARO
Clerk

A true copy,
A Daniel Fusaro
Clerk

APPENDIX C

Statutes and Regulations Involved

18 U.S.C. 371:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

15 U.S.C. 77b(11) (Sec. 2(11) of the Securities Act of 1933):

> "The term 'underwriter' means any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking; but such terms shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual customary distributors' or sellers' commission. As used in this paragraph the term 'issuer' shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer."

15 U.S.C. 77e(a)(1) (Sec. 5(a)(1) of the Securities Act of 1933):

> "(a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

"(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; * * *."

15 U.S.C. 77x (Sec. 24 of the Securities Act of 1933):

"Any person who willfully violates any of the provisions of this title, or the rules and regulations promulgated by the Commission under authority thereof, or any person who willfully, in a registration statement filed under this title, makes any untrue statement of a material fact or omits to state any material facts required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both."

Rule 133 of the General Rules of the Securities and Exchange Commission:

"(a) For purposes only of Section 5 of the Act, no 'sale,' 'offer,' 'offer to sell,' or 'offer for sale' shall be deemed to be involved so far as the stockholders of a corporation are concerned where, pursuant to statutory provisions in the State of incorporation or provisions contained in the certificate of incorporation, there is submitted to the vote of such stockholders a plan or agreement for a statutory merger or consolidation or reclassification of securities or a proposal for the transfer of assets of such corporation to another person in consideration of the issuance of securities of such other person or voting stock of a corporation which is in control, as defined in Section 368(c) of the Internal Revenue Code of 1954, of such other person,

under such circumstances that the vote of a required favorable majority (1) will operate to authorize the proposed transaction so far as concerns the corporation whose stockholders are voting (except for the taking of action by the directors of the corporation involved and for compliance with such statutory provisions as the filing of the plan or agreement with the appropriate State authority), and (2) will bind all stockholders of such corporation except to the extent that dissenting stockholders may be entitled, under statutory provisions or provisions contained in the certificate of incorporation, to receive the appraised or fair value of their holdings.

"(b) Any person who purchases securities of the issuer from security holders of a constituent corporation with a view to, or offers or sells such securities for such security holders in connection with, a distribution thereof pursuant to any contract or arrangement, made in connection with any transaction specified in paragraph (a), with the issuer or with any affiliate of the issuer, or with any person who in connection with such transaction is acting as an underwriter of such securities, shall be deemed to be an underwriter of such securities within the meaning of section 2(11) of the Act."

APPENDIX D

Listed below are the names of the Government witnesses, the period of time covered by their testimony and the pages of the stenographic minutes encompassing their testimony. During the time periods indicated and within the specified pages of the transcript the testimony of the witnesses was endlessly interrupted by colloquies, side-bar conferences, voir dire hearings, motions, arguments, etc. (For example, the 5,331 pages of stenographic minutes containing Guterma's testimony include approximately 1990 pages of colloquy, side bar conferences, etc.) Any testimony relating to petitioner is indicated by a number next to the witness' name and briefly described in the corresponding footnote.

Name	Period of Testimony	Stenographic Minutes
[1] Alexander L. Guterma	March 9, 1962-May 25, 1962	679-6010
John W. McCabe	May 28, 29, 31, 1962	6077-6127 6251-6322
John F. McLaughlin	May 28, 1962	6127-6131
George C. Seifried	May 28, 29, 1962	6131-6155 6195-6250
Daniel F. Cunningham	May 28, 1962 May 31, 1962	6155 6355-6435
Joseph Gallienne	May 31, 1962	6323-6354
Richard S. Helstein	May 31, 1962	6436-6443
Herbert Porcelan	May 31, June 1, 1962	6443-6460
Edward R. Conlin	June 1, 1962	6460-6474
Alexander Timm	June 1-4, 1962	6475-6690

1. Guterma testified regarding the petitioner on March 27, 1962, at pages 1031 to 1033 and 1036-1036a. A total of five pages. Guterma was cross-examined by petitioner on May 3 and 7, 1962, at pages 4524 to 4548 and 4713 to 4728. A total of 40 pages. Petitioner's recross of Guterma appears on page 5963 and took place on May 25, 1962.

Appendix D

Name	Period of Testimony	Stenographic Minutes
R. W. Merrick	June 4, 1962	6690-6713
Donald Kloenne	June 4, 1962	6714-6744
Raymond L. Manning, Sr.	June 4, 1962	6746-6754
Edward Spiridon	June 4, 1962	6755-6766
Harry T. Slavin	June 5, 1962	6820-6856
Herbert Sorter	June 5, 6, 7, 1962	6857-6909 6990-7036 7076-7104
George Fauty	June 5, 1962	6910-6919
Eugene Fuessle	June 5, 7, 1962	6919-6934 7105-7164 7175-7178
Thomas L. Weil	June 6, 1962	7037-7064
George Newman	June 20, 1962	7260-7282
Wilhelmina Gustafson	June 20, 1962	7282-7312
Robert Paulson	June 20-22, 25-29, 1962	7321-7585, 7616-8364
John C. Eigeman	June 22, 1962	7586-7615
Edna von Thaden	June 29, 1962 July 2, 1962	8364-8414
Mortimer B. Burnside	July 2, 1962	8414-8505
Joel Landres	July 2, 3, 1962	8506-8529 8580-8601
Ben Gould	July 2, 3, 1962	8539-8558, 8602-8715
William Bowen	July 3, 5, 6, 9, 1962	8716-9135

2. Landres, the principal of the company that printed material for G. F. Rothschild & Co., testified during portions of two days, July 2 and 3, 1962. His testimony, including colloquy occupies 54 pages of the minutes. Landres did not testify to a single act or statement by petitioner.

Appendix D

Name	Period of Testimony	Stenographic Minutes
Richard C. Leonhardt[3]	July 10, 11, 17-19, 1962	9155-10,121
Nathan Weinflash	July 19, 20, 1962	10,126-10,172
Lionel Mantell	July 20, 23, 1962	10,172-10,342
David S. Fischman	July 23-25, 1962	10,349-10,681
Morris Fishman	July 25, 26, 30, 31, 1962	10,631-11,075
Morris Kosut	July 31, 1962 August 1, 1962	11,127-11,333
Francis Sorrentino	August 6, 1962	11,704-11,708
Frank Donar	August 6, 1962	11,709-11,717
William F. Walsh	August 6, 1962	11,714-11,716
Paul Hughes[4]	August 7-15, 1962	11,719-12,459
Ira Hibbett Reese[5]	August 15-17, 1962	12,460-12,748
Maxwell Hauser	August 20, 1962	12,760-12,794
Robert A. Besthoff	August 20, 1962	12,795-12,812a
Irving B. Freedman	August 20, 1962	12,813-12,831
Alois Sommerlatt	August 20, 19[redacted]	12,832-12,837
Herman William Brann	August 20, 1962-September 14, 1962	12,838-15,481

3. Although Leonhardt testified that he had never met petitioner (9309, 9900), he further testified to a conversation with Guterma in which the latter mentioned petitioner and the selling methods of the Rothschild Company. This testimony appears on three pages of the transcript (9309-9401) and was given on July 19, 1962.

4. Hughes' testimony regarding petitioner covers approximately two pages of the transcript and consist of his having seen petitioner at the United Dye office (11921-11923). The cross-examination of Hughes by petitioner covered 8 pages of the minutes (12372-12380) and the recross approximately 7 pages (12437-12443).

5. Reese was the only witness whose United Dye shares were sold by Rothschild & Co. His direct examination, given on August 15 and 16, 1962 and contained at 12460 to 12669 of the minutes mainly concerned Reese's relationship with Swann and the identification of documents. His cross-examination by petitioner on August 17, 1962, covered 32 pages of the minutes (12676-12708). Reese testified that he never informed anyone at Rothschild of his private deal with Swann or that the securities were not his (12694, 12701).

Appendix D

Name	Period of Testimony	Stenographic Minutes
Marie Defenthis	September 14, 1962	15,482-15,488
Martin Gillen, Jr.	September 14, 1962	15,489-15,496
Allen S. Kilmer	September 17, 18, 1962	15,567-15,652
Hilary S. Pitchardo	September 18, 19, 1962	15,653-15,783
[5] Anna Haman	September 19, 20, 1962	15,784-15,990
John G. Shaltz	September 20, 1962	15,995-16,018
Cornelius F. Griffin	September 20, 21, 24, 1962	16,019-16,031 16,161-16,215
[6] George J. Buckner	September 21, 1962	16,037-16,145
Harry J. Mullaney	September 21, 1962	16,151-16,160
Kenneth Berry	September 24, 1962	16,215-16,232
[7] Walfred Sund	September 24, 1962	16,242-16,294
Martin Bach	September 24, 1962	16,295-16,305
[8] Quinton Murray	September 24, 1962	16,339-16,346, 16,380-16,394
Aristides W. Nickas	September 24, 1962	16,346-16,356
Carl A. Roeper	September 24, 1962	16,357-16,370
Fred M. Miller	September 24, 26, 1962	16,395-16,486
Joseph Jedlowski	September 26, 1962	16,486-16,567
Sidney S. Barkley	September 27, 28, 1962 October 2-4, 1962	16,673-17,491
Francis J. Sorrentino (recalled)	October 4, 1962	17,498-17,509
Allen Kilmer (recalled)	October 4, 5, 9, 10, 1962	17,509-18,024 18,113-18,168
Mitchell Moss	October 10, 1962	18,025-18,065
Hyman D. Lehrich	October 15, 17, 24, November 1, 2, 5, 1962	18,183-19,247

6. The testimony of purchasers of United Dye shares from G. F. Rothschild & Co. contains no mention of petitioner.

7. Sund, who was the cashier at G. F. Rothschild & Co., testified regarding petitioner's relationship and authority in that firm as a principal thereof. His testimony did not involve petitioner's relationship to any of the charged co-conspirators.

8. Murray, who was the cashier at Cornelius DeVroedt, Inc., testified that petitioner never gave any orders or issued any instructions at that firm (16391-16392).

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 165

CHARLES ROSENTHAL, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No.

CHARLES ROSENTHAL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Charles Rosenthal prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, affirming petitioner's conviction and sentence for conspiring* to violate the securities laws and to defraud the United States by impeding the functions of the Securities and Exchange Commission, and for the illegal sale of unregistered securities.**

Opinions Below

The opinion of the Court of Appeals, not yet reported, is reprinted in the Appendix (App. 1 36a).†

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* 18 U. S. C. § 371.

** 15 U. S. C. § 77e(a), (c), 77x and 18 U. S. C. § 2.

† Unless the context clearly indicates otherwise, references in parentheses are distinguished as follows: to the appendix of this petition, by App.; to the stenographic minutes of the trial, by plain numerals without prefix.

Jurisdiction

The United States Court of Appeals for the Second Circuit entered judgment on March 17, 1964, and denied rehearing on April 10, 1964. By Order dated April 24, 1964, Mr. Justice John M. Harlan extended petitioner's time to file this petition to June 9, 1964. The jurisdiction of this Court is invoked under Title 28, §1254(1), United States Code.

Questions Presented

1. Whether petitioner Rosenthal's constitutional right to the effective assistance of counsel was violated when

(a) The trial court refused to permit him to retain counsel of his own choosing; and

(b) The trial court assigned petitioner counsel not only over his own vehement protests, but despite equally adamant objections by assigned counsel and counsel for co-defendants as well; and

(c) The assigned counsel represented co-defendants whose interests were in serious conflict with those of petitioner, which fact was brought to the trial court's attention immediately both by petitioner and by proposed counsel; and

(d) The co-defendants then represented by assigned counsel were never asked nor permitted to voice their views on whether they approved or disapproved of the assignment of their attorney to represent petitioner?

2. Whether petitioner was deprived of due process of law by the mass conspiracy trial which compelled him to run a gantlet of an 11-month trial when, by the prosecutor's admission, he could have been tried in less than a week?

A

Whether the Government intentionally and with calculated design to abridge petitioner's right to a fair trial opposed severance of petitioner's case so as to be able to introduce against him otherwise incompetent, immaterial and prejudicial evidence?

B

Whether the trial court abused its discretion in denying petitioner a severance and thus aided and abetted the prosecutor in waging a battle of attrition to harass and oppress petitioner and to link him with the major conspirators, despite his concededly insignificant role in the alleged transgressions?

3. Whether petitioner was deprived of his constitutional right to confront and examine witnesses or to compulsory process for obtaining witnesses in his favor, when the trial judge forbade any questioning of the witness Smith following his invocation of the Fifth Amendment privilege?

A

Whether the privilege against self-incrimination protects only the accused as the Fifth Amendment clearly indicates, or extends protection to any witness at all?

4. Whether the prosecutor and the trial court, in compelling petitioner to expend his entire personal fortune to defend himself in an 11-month trial, when without prejudice to the Government he could have been tried in less than a week, imposed upon petitioner cruel and unusual punishment or an excessive fine, in violation of the Eighth Amendment? (In effect, the requirement that petitioner participate in this battle of attrition meant that he would suffer irreparable financial ruin, whether he won or lost the case.)

5. Whether the rules permitting the Government to join petitioner in a mass conspiracy trial consuming over 11 months' time and to thus virtually ruin petitioner financially are, in effect, and as practiced, bills of attainder (Pains and Penalties), since petitioner was not entitled to determine whether he should be tried separately or jointly, it being a matter for the prosecutor and the court to determine?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent portions of the United States Constitution, Article 1, § 9 and Amendments V, VI, and VIII, and the statutes involved, namely, Rules 8 and 14, F. R. Cr. P., 15 U. S. C. §§ 77e(a)(1), 77x and 18 U. S. C. §§ 2, 371 are reprinted in the Appendix (App. 37-9a).

Statement of the Case

1. Proceedings Below.

The judgment of the Court of Appeals sought to be reviewed by this petition affirmed a judgment of conviction and sentence entered in the United States District Court for the Southern District of New York after trial before Herlands, J., and a jury. Jurisdiction is conferred on the District Court by 18 U. S. C. § 3231.

Petitioner was sentenced to four years imprisonment and fined $20,000 after a guilty verdict on a charge of conspiracy (18 U. S. C. § 371) to illegally sell unregistered stock to the public in violation of specified securities laws and to defraud the United States by impeding the functions of the Securities and Exchange Commission, and on two counts charging the illegal sale of unregistered stock in violation of 15 U. S. C. §§ 77e(a)(1), 77x and 18 U. S. C. § 2.

2. The Evidence.

As the Court of Appeal's opinion shows (App. 4-11a), the evidence adduced at the *11-month trial* involved primarily the intricate and fraudulent machinations of convicted embezzler Alexander L. Guterma. It shows that by the means of a "complex chain of [illegal] transactions" (App. 4a), including fraudulent mergers and related corporate lootings (e.g. Bon Ami), Guterma and his group created and acquired a half-million shares of stock in the United Dye and Chemical Corporation.

The evidence did *not* show, for the government did not attempt to prove, that petitioner took any part in those crimes, or that he had any stake in them (App. 17a). Rather, petitioner, who was allegedly a broker-dealer (App. 2a), was charged with having later joined the "multi-stage [Guterma] conspiracy" (App. 5a), for the purpose of distributing the unregistered stock to the public.

Thus, the evidence against petitioner, assuming its adequacy and viewed in a light most favorable to the government, showed that he embarked upon a later criminal venture of very definite limits. He was concerned, at most, with the sale of the Guterma group's unregistered control stock and with an incidental effort to manipulate the market price of that stock (App. 10-11a).

Although the government conceded that petitioner's first involvement with Guterma came after the fraudulent and criminal transactions by which the Guterma group acquired the United Dye stock, it contended that petitioner joined an existent "multi-stage conspiracy" in order to effectuate what it characterized as the last stage thereof, viz., to illegally sell the shares to the public. That the illegality of the means by which Guterma acquired the control stock was entirely irrelevant to petitioner's guilt or innocence of the crimes charged against him was deemed immaterial by the Court of Appeals (App. 17a). It held that the jury verdict on the conspiracy count was a finding

that the single conspiracy charged did exist (App. 5a, 17a) and that petitioner was not prejudiced by the introduction of highly inflammatory evidence concerning the crimes of others. It held that the broker-defendants' (including petitioner's) lack of complicity in, or even awareness of, the crimes attendant upon the acquisition of the control stock was immaterial.

3. The Trial and the Deprivation of Petitioner's Right to Due Process of Law.

Petitioner was one of 33 persons named as defendants in the complex indictment, which contained no less than 30 counts (App. 3a). On motion of the government, thirteen defendants were severed prior to trial. Eleven of those severed were salesmen in defendant brokerage firms, one was a defendant corporation, and another was a fugitive.* Thirteen other defendants pleaded guilty to parts of the indictment either prior to or during the trial. Of those who pleaded guilty, four were firms or corporations and seven were part of the "Guterma group." Another defendant, a corporation, was allowed to enter a plea of *nolo contendere* in the third month of trial, when, after its attorney was assigned to represent petitioner as well, it was discovered that a definite conflict of interest barred the joint representation (*infra*, pp. 8-10).

With the exceedingly high number of guilty pleas and severances prior to trial, all on motion of the government, the prosecutor was bent on trying the remaining defendants together. The trial judge ratified the prosecutor's choice by denying petitioner's motion for a severance.

The prosecutor, in oral argument on appeal, expressed the view that *petitioner could have been tried in four days' time*. However, the trial resulting in petitioner's conviction was a battle of attrition. By virtue of the prosecutor's opposition to petitioner's application for a severance,

* Another defendant was severed, when during trial, he suffered a stroke.

ratified by the trial judge, petitioner was forced to run the gantlet of *an over 11-month trial*, during which over 26,000 pages of testimony, colloquy and ancillary matters were recorded (App. 21-2a), by far the greater part of which had nothing whatever to do with the guilt or innocence of petitioner.

It was in this context that petitioner's lawyer, in the third month of trial, fell ill.

4. Petitioner's Lack of Assistance of Counsel.

If ever a case demanded the effective assistance of counsel, this case did. The trial court was vexed by the prolixity of the government's case, the overwhelming volume of exhibits, and the confusion wrought by the fact that, because of severances and pleas, only five of the thirty-three defendants participated in the trial to conclusion. Over 8800 pages, almost half of the entire record, is devoted to colloquy alone (App. 22a).

It was in this context that petitioner was forced to move the trial court for a continuance or a severance when his retained attorney became ill *in the third month of trial*.

Petitioner's lawyer fell ill on May 10, 1962. The trial judge immediately advised petitioner that he must obtain new counsel by May 16, 1962, five days later (5270-71, 5312-14). Despite the fact that both petitioner's lawyer's personal physician and a court assigned physician independently reported that he could resume participation at the trial within two weeks, the court refused to adjourn and directed that the trial resume on May 21, 1962 (5337-38, 5352).

Despite the fact that the six days given petitioner to obtain substitute counsel included a weekend, petitioner came forward with three attorneys (5308, 5321-2, 5343, 5369). However, none would step in to the trial on the 21st, each explaining that he required more time to read the over 5000 pages of record and study the intricate and

prolix indictment and proceedings—in short, to adequately prepare the case.*

Rather than wait an additional week for petitioner's lawyer to recover, or sever petitioner from trial,** the trial judge appointed Mr. Bobick, the attorney for co-defendants Cornelius DeVrodt and Cornelius DeVrodt, Inc., to represent petitioner.

As soon as Mr. Bobick had an opportunity to consult with Mr. Rosenthal, he informed the trial judge that he could not accept the assignment since the interests of his client were in conflict with those of petitioner.*** Bobick was adamant in his refusal to accept the assignment (5380):

> "I would say this, that the facts recited to me by Mr. Rosenthal are in *direct contradiction* to the facts I had given to me by my client, Mr. DeVrodt individually, who is still under indictment and may face trial in this case, and also in *direct violation* of what he told me was the situation so far as the corporation is concerned. And if the facts as related by Mr. Rosenthal are true, at that point I believe there would be a *direct conflict* [of interest] between both of them, yes, your Honor." (Emphasis Supplied)

Petitioner objected to the assignment of Mr. Bobick. He pointed out that, in addition to the fact that his interests were divergent from those of Mr. Bobick's other clients, he did not know Mr. Bobick so he lacked confidence in his "capabilities." He also was concerned with questions

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* The trial judge reported that other attorneys whom he had asked to represent petitioner begged off in view of the expected length of the trial (5360-1) (all such expectations were surpassed).

** There would have been no prejudice to the government by a severance. Petitioner could have been tried with other defendants as to whom a severance had been granted (*supra*, p. 6).

*** Mr. DeVrodt had earlier suffered a stroke and was severed from the case, but Mr. Bobick still represented him. DeVrodt, Inc. was a defendant in the case at trial.

of "personality" and their possible effect on the jury (5365-66).

An attorney from the office of one of the counsel chosen by petitioner, who had agreed to step in to trial on petitioner's behalf but who required more time to prepare than that allowed by the trial judge, argued (5379):

> "Well, I think, your Honor, that this is reasonably patent: One, the defendant has not chosen to be represented by Mr. Bobick; two, that Mr. Bobick, who is familiar with the facts of the case has spoken with this defendant and his own, declares that *there is a conflict*." (Emphasis Supplied)

Mr. Berman, who appeared *pro se* in his own defense, very cogently voiced his objections to the court's action (5392-93):

> "The objection is very simply this: In a conspiracy trial where a defendant hires his own attorney and is not represented by an attorney who represents several co-defendants, it is done for a *specific purpose*, to show that there is *no continuity* between the defendants or *no community* between the defendants. When the Court appoints a co-defendant's counsel to represent another co-defendant, *regardless of the instructions* it will give to the jury it is saying in effect these defendants have a community of interest which can be represented by one attorney.
>
> "This statement, as far as I am concerned, is *prejudicial* to every other defendant who sits here at counsel table, because you could have just as well appointed me, perhaps to represent Mr. Rosenthal as far as the jury is concerned, or you might have appointed Mr. Samuels to represent Mr. Rosenthal, or you might have appointed Mr. Fuller. You are then saying to the jury, regardless of your instructions, 'The defendants do have a community of interest.'
>
> "Now, this is a fact which *the government is supposed to prove* and is *not to be given to them by the Court*." (Emphasis Supplied.)

The objections fell on deaf ears, for the trial judge was anxious to resume trial. Although three months had elapsed from the commencement of trial, the trial judge afforded petitioner only six days, including a weekend, to find substitute counsel of his choice who would be willing to step into the trial, which was expected to, and did, last many more months, at the beginning of the following week.

Later in the trial the foreseeable happened. The conflict of interest between petitioner and his appointed lawyer's other clients became absolutely apparent and the trial judge was reluctantly forced to adjourn proceedings again. Finally, at the prosecutor's suggestion, he adopted the dubious remedy of allowing Mr. Bobick's corporate client to withdraw its plea of not guilty and to enter a plea of *nolo contendere* (16936-37).

5. The Deprivation of Petitioner's Right to Compulsory Process.

Sidney S. Barkley was the chief government witness against petitioner. He testified that petitioner hired some of the I. F. Stillman* salesmen (17300, 17345) and had lectured them on how to operate a "boiler-room" selling campaign (16710). He described petitioner as the "Fagin" who assured the salesmen that they could guarantee customers that the stock would close at a higher price for the day on the Exchange than that at which they purchased it over the counter (16171).

Significantly, Barkley, who had a criminal record, had pleaded guilty to one count of the indictment prior to trial (16673-74). He admitted that he was hopeful that, in exchange for his "cooperation" in testifying against petitioner, the government would not proceed against him on three other counts (17429-30).

Witness Milton D. Smith, named by Barkley as one of the salesmen whom petitioner had allegedly hired (17345),

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* I. F. Stillman, Inc. was an over-the-counter brokerage firm which had pleaded guilty to parts of the indictment prior to trial.

was subpoenaed as a witness by petitioner. He had been interviewed by petitioner's court-appointed lawyer a few days earlier and had answered prepared questions (23137-38) based upon Barkley's testimony against petitioner (23193-99). His answers prompted petitioner's lawyer to advise him that he would be called as petitioner's witness (23138).

Obviously, Smith was an important witness, for he could put the lie to Barkley's testimony and exonerate petitioner from guilt. However, upon the first question put to him by petitioner's attorney, he invoked the Fifth Amendment privilege against possible self-incrimination (23126). The prepared questions were read to the trial judge (23193-99) and it was shown, and conceded, that they involved the witness' activities in 1956 solely, as to which the statute of limitations had already run (23126, 23129, 23132). Nevertheless, the trial judge declined to direct the witness to answer on the theory that his answers might constitute a waiver of *his right to remain silent as to his later activities* under investigation in separate S. E. C. proceedings not related to I. F. Stillman and concerning which he was not going to be questioned by petitioner's lawyer (23162, 23168-70).

Petitioner then made application to put the prepared questions to the witness in the presence of the jury. The trial judge originally agreed to such procedure, advising petitioner's lawyer that it was his "responsibility." (23170). However, he later changed his mind and denied petitioner the right to question Smith in the presence of the jury (23202).

Reasons for Granting the Writ

1. Whether petitioner Rosenthal's Constitutional right to the effective assistance of counsel was violated when (a) the trial court refused to permit him to retain counsel of his own choosing; (b) the trial court assigned petitioner counsel not only over his own vehement protests, but despite equally adamant objections by assigned counsel and counsel for co-defendants as well; (c) the assigned counsel represented co-defendants whose interests were in serious conflict with those of petitioner, which fact was brought to the trial court's attention immediately by both petitioner and proposed counsel; and (c) the co-defendants then represented by assigned counsel were never asked nor permitted to voice their views on whether they approved or disapproved of the assignment of their attorney to represent petitioner?

The actions of the trial judge, when *in the third month of an 11-month trial*, petitioner's retained lawyer required a two week continuance due to illness, represent one of the most flagrant and audacious denials of the effective assistance of counsel ever to escape censure by a Court of Appeals. Rather than grant petitioner a severance* or a reasonable continuance to enable his lawyer to return, or substitute lawyers of his own choice to prepare, the trial judge saddled petitioner, against his will, over the vehement protests of assigned counsel, with the lawyer of two of his co-defendants and alleged "co-conspirators."

The justifications offered by the Court of Appeals (App. 33-4a) certainly are not sufficient.

That attorneys may become temporarily ill during the course of a year, especially when exposed to the physical exhaustion attendant upon trial duties, is hardly an unpredictable contingency. The question is raised whether the prosecutor and the trial judge did not assume the risk in foisting an over 11 month trial upon petitioner, especially

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* There could be no prejudice to the government by a severance for petitioner could have been tried with the other defendants as to whom a severance had already been granted (*supra*, p. 6).

in view of the prosecutor's concession that he could have been tried *in less than a week*.

The Court of Appeals states, presumably by way of partial justification for the actions of the trial judge, that petitioner "had a month's notice that his lawyer's health was questionable." (App. 33a) Perhaps the Court implies that petitioner's failure to obtain an additional, stand-by lawyer in some way authorized the trial court to compromise his right to counsel. Of course, the Sixth Amendment hardly tolerates such a notion. The impossible financial burden contemplated by the Court's implication—retaining two attorneys, rather than one, to devote a year's time to a trial—is too plain to question.

The Court states that petitioner only secured one substitute attorney, who was not "willing to proceed without an inordinate continuance . . ." (App. 33a).

Firstly, the Court of Appeals is factually incorrect. Petitioner came forward with *three attorneys* each of whom required more than the few days afforded by the trial judge for preparation (5308, 5321-2, 5343, 5361). Secondly, when petitioner's lawyer fell ill, over 5300 pages of testimony had already been recorded—an amount which exceeds that in many completed cases—and the trial was in its third month. In addition, the trial promised to, and did, drag on for many more months.

The trial judge's refusal, *under the circumstances*, to give petitioner more than four days, exclusive of a weekend, to obtain counsel of his choice, and equally arbitrary refusal to give new counsel more than five days to prepare, cannot be reconciled with the mandate of the Sixth Amendment.

As was stated by this Court in *Chandler* v. *Fretag*, 348 U. S. 3, 9-10 (1954):

> "Regardless of whether petitioner would have been entitled to the appointment of counsel, his right to be heard through his own counsel was unqualified . . .

> "A necessary corollary is that a defendant must be given a reasonable opportunity to employ and consult with counsel; otherwise, the right to be heard by counsel would be of little worth."

If ever a case required the effective assistance of prepared counsel, this case did. Yet, the admonition of this Court that "'[t]he defendant needs counsel and counsel needs time'" (*Hauck* v. *Olson*, 326 U. S. 271, 278 (1945)) was simply paid lip-service by the trial judge.

That the Sixth Amendment requires that an accused be afforded adequate time, under all the circumstances, to obtain counsel of his choice, is settled. *Belford* v. *United States*, 288 F. 2d 298, 301 (CA 9, 1961); *Tinkle* v. *United States*, 254 F. 2d 23 (CA 8, 1958). That "counsel needs time" to prepare is also settled, for the Sixth Amendment contemplates the "effective" assistance of counsel. *United States* v. *Bergamo*, 154 F. 2d 31 (CA 3, 1946).

The trial judge's concern with "delay" which caused him to compromise petitioner's constitutional right, was, unfortunately, not abiding. The trial was almost half taken up with colloquy in which the trial judge took a most active part (App. 22a) causing the Court of Appeals to comment that "a tighter rein by the Judge would . . . have resulted in a materially shorter trial." (App. 23a) In any event, the trial judge's concern with delay, when petitioner, through no fault or choice of his, was without counsel, was most improper. It recalls the answer of the Eighth Circuit in *Tinkle*, *supra*, at 29:

> "Suggestion is made that delay would have been costly and disturbing to the government. There is no question but what delay would have been expensive, but Constitutional rights are not measured by the cost of prosecution. The trial court's ruling . . . is no answer to appellant's claimed denial of assistance of counsel."

The trial judge's impetuous and peremptory refusal to grant a reasonable continuance so that petitioner's lawyer

could return or, at least, so the substitute attorneys chosen by petitioner could adequately prepare to enter the excessively complicated and lengthy trial, cannot be countenanced.

Rather than sever petitioner or adjourn for the additional week that doctors deemed necessary for the recovery of his lawyer, the trial judge dealt with the problem by foisting upon petitioner unwanted counsel who had other clients in the case and who, himself, tried vainly to avoid the assignment.

It seems plain that the trial court never seriously believed that petitioner could secure substitute counsel who would be willing to enter the case with so little time to prepare. He suggested the possibility of appointing a co-defendant's attorney almost immediately after hearing of petitioner's lawyer's illness (527a, 77).

That a mere perfunctory effort to afford an accused his right to *prepared* counsel *of his choice* is not compliance with the constitutional mandate is settled. *Avery* v. *Alabama*, 308 U. S. 444 (1940); *Powell* v. *Alabama*, 287 U. S. 45, 59 (1932); *United States* v. *Johnston*, 318 F. 2d 288 (CA 6, 1963); *Tinkle* v. *United States*, *supra*; *United States* v. *Koplin*, 227 F. 2d 80 (CA 7, 1955).

The question is presented whether the trial judge's assignment of a co-defendant's lawyer to represent petitioner, under the circumstances presented in this case, was not merely a sham and not compliance with the Sixth Amendment.

In *Glasser* v. *United States*, 315 U. S. 60 (1942), this Court held to be inconsistent with the Sixth Amendment the assignment of a lawyer for one defendant in a conspiracy case to represent another. This Court held (at 70, 75-6):

> "Even as we have held that the right to the assistance of counsel is so fundamental that the denial by a state court of a reasonable time to allow the selection of counsel of one's own choosing, and

the failure of that court to make an effective appointment of counsel, may so offend our concept of the basic requirements of a fair hearing as to amount to a denial of due process of law contrary to the Fourteenth Amendment . . . *so are we clear that the 'assistance of counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests* . . .

. . . .

"*There is yet another consideration.* Glasser wished the benefit of the *undivided assistance of counsel of his own choice.* We think that *such a desire on the part of an accused should be respected. Irrespective of any conflict of interest,* the additional burden of representing another party may conceivably *impair counsel's effectiveness.*

"*To determine the precise degree of prejudice sustained by Glasser as a result of the court's appointment of* [his lawyer] *as counsel for* [a co-defendant] *is at once difficult and unnecessary.* The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." (Emphasis added.)

Most important, this Court there observed:

"In *conspiracy cases* [as here], where the liberal rules of evidence and the wide latitude accorded the prosecution may, and sometimes do, operate unfairly against an individual defendant, *it is especially important that he be given the benefit of the undivided assistance of his counsel without the court becoming a party to encroaching that assistance.*" (Emphasis added).

Thus, the broader question is also presented whether the Second Circuit rule that a court, even in a conspiracy case, may assign to a defendant the attorney for a co-defendant, where there appears to the trial judge "to be no conflict" is not an unauthorized departure from the decision of this Court in *Glasser, supra.*

The prejudice inherent in the assignment of a co-defendant's lawyer to represent an accused, against his will, especially in a conspiracy case, recognized by this Court in Glasser, took form in this case.

The Court's action in assigning petitioner's co-defendants' attorney to represent petitioner could not but give the jury the impression that there was a community of interest between them and Rosenthal—a fact which the prosecutor was required to prove, for this was a conspiracy prosecution.

Later, when one of the co-defendants changed his plea of innocence, the jury may have, even unconsciously, adopted the view that the plea was some evidence of petitioner's guilt.

That the trial judge gave appropriate instructions to the jury offers little comfort, for "[t]he naive assumption that the prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction." *Kotteakos v. United States*, 328 U. S. 430, 453 (1946).

To what extent Mr. Bobbet's "freedom of mobility" was abridged by virtue of his joint representation is impossible to calculate. Whether he would have conducted his representation of petitioner's co-defendants' differently prior to his assignment as counsel for petitioner, had he had reason to anticipate the assignment, one may only guess. The necessary division of effort caused by a joint representation against the wishes of the attorney and his clients is obvious. Petitioner's unwanted new counsel, in addition to being hampered by his inability to prepare petitioner's defense in the depth which could be given had he not represented other defendants, did not enjoy the confidence which would have been his had petitioner retained him or wanted him.

Despite all these considerations, contemplated by this Court in *Glasser*, the trial judge deemed it adequate to af-

ford petitioner about ten days in which to retain a new lawyer *and* resume trial. Perhaps such a ruling would not be inconsistent with the Sixth Amendment in all cases. However, it seems plain that in a case of this duration and complexity, where the unavailability of chosen counsel was not attributable to the accused, such a ruling was absolutely violative of the Sixth Amendment. The utter disregard on the part of the trial judge of the effort which would need be expended by new counsel to familiarize himself with the over 5,000 pages of record, the 30-count indictment, and with his new client, so that a strategy for defense might be prepared, is shocking. The Court's unwillingness to sever as an alternative, especially in view of the fact that many defendants had already been severed, so that no possible prejudice to the government could arise, is similarly most disturbing.

When petitioner's co-defendants' lawyer was assigned to represent petitioner as well, *in the third month of trial*, he reported to the trial court:

> "Your Honor, may I advise the Court that *subsequent to the assignment by the Court* of myself as Mr. Rosenthal's counsel, I had *for the first time* the opportunity to speak with Mr. Rosenthal, which I did on Friday, and after speaking to Mr. Rosenthal, *I firmly believe in my mind that there is a conflict between De Vroedt, Inc. and Mr. Rosenthal.*" (5375)
>
> "I would say this, that *the facts recited to me by Mr. Rosenthal are in direct contradiction to the facts I had given to me by my client*, Mr. De Vroedt individually, who is still under indictment and may face trial in this case, *and also in direct violation of what he told me was the situation so far as the corporation is concerned.* And if the facts as related by Mr. Rosenthal are true, at that point I believe there would be a direct conflict between both of them." (5380)

The trial judge's eagerness to resume trial at all costs, despite the protests of assigned counsel and petitioner that a conflict of interests existed, later caused the Court to take

drastic measures to "patch up" this error as best it could. When the conflict of interest became so obvious that it could no longer be ignored, the court, at the prosecutor's instigation, adopted the questionable "solution" of allowing assigned counsel's other client, still in the case, to withdraw its plea of not guilty and to enter a plea of *nolo contendere*.*

The simple and obvious fact is that the trial court ran roughshod over petitioner's rights, with the apparent view to avoid inconvenience to the government, the court, and the co-defendants. The court did not even take the time to inquire of assigned counsel's other clients what their views were with respect to the proposed assignment.

Unlike the defendants in *United States* v. *Arlen*, 252 F. 2d 491, 494 (2d Cir. 1958), and *United States* v. *Benfremo*, 319 F. 2d 916, 936 (CA 2, 1963), cited by the Court of Appeals (App. 34a), petitioner here did not waive his right to counsel by manipulating that right for ulterior purposes, nor was petitioner afforded the six weeks given the defendant in the *Arlen* case.

The prejudice to petitioner is obvious. However, prejudice is irrelevant, for the right to counsel is "fundamental and absolute," and the courts will not indulge in "nice calculations" as to the amount of prejudice its denial entails. *Glasser* v. *United States*, *supra*, 76. Its fundamental and absolute nature should be reasserted here.

During the course of judicial history and experience one fact has emerged with absolute clarity—that in a criminal trial the accused's most important constitutional privilege may be his right to the effective assistance of counsel. Thus, Cooley, in his monumental treatise on the Constitution, observes:

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* Of course it is plain that Mr. Babick could not adequately and completely represent both his clients in negotiating with the government as to which of his clients should be allowed to change his plea.

> "Perhaps the privilege most important to the accused of crime, connected with his trial, is that to be defended by counsel." 1 Cooley, Const. Lim. (8th Ed.) 696.

More recently, Mr. Justice Douglas, quoting approvingly from a speech delivered by Mr. Justice Brennan, has concurred:

> "Without the help of a lawyer all other safeguards of a fair trial may be empty." 45 Minn. L. Rev. 693 (1961)

Repeatedly, and with increasing clarity, this Court has indicated that the right to the effective assistance of counsel, guaranteed by the Sixth Amendment, is the accused's most valued protection. It has stricken both federal and state convictions where the effective assistance of counsel has been abridged or denied.

> "We concluded that certain fundamental rights, safeguarded by the first eight amendments against federal action, were also safeguarded against state action by the due process clause of the Fourteenth Amendment, and among them the fundamental right of the accused to the aid of counsel in a criminal prosecution." Grosjean v. American Press Co., 297 U. S. 233, 243-244 (1936).

In *Johnson* v. *Zerbst*, 304 U. S. 458, 462 (1938), this Court held void for lack of jurisdiction a conviction against an accused deprived of the effective assistance of counsel, stating:

> "[The assistance of counsel] is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty. . . . *The Sixth Amendment stands as a constant admonition that if the constitutional safeguard it provides be lost, justice will not 'still be done.'*" (Emphasis added)

The admonition of the Sixth Amendment was quite forcefully demonstrated in the wake of this Court's land

mark decision in *Gideon* v. *Wainwright*, 372 U. S. 335 (1963) wherein the Court extended the protection of the Sixth Amendment by guaranteeing counsel to those accused in either capital or non-capital cases in state courts as well as federal courts.*

The important question is raised whether the trial court's actions in refusing to sever or continue the case for a reasonable period, and in assigning a co-defendant's lawyer to represent petitioner, over the protests of both petitioner and the lawyer, were not mere shams and not compliance with the constitutional mandate.

2. Whether petitioner was deprived of due process of law by the mass conspiracy trial which compelled him to run a gantlet of an 11-month trial when, by the prosecutor's admission, he could have been tried in less than a week?

A

Whether the Government intentionally and with calculated design to abridge petitioner's right to a fair trial opposed severance of petitioner's case so as to be able to introduce against him otherwise incompetent, immaterial and prejudicial evidence?

B

Whether the Trial Court abused its discretion in denying petitioner a severance and thus aided and abetted the prosecutor in waging a battle of attrition to harass and oppress petitioner and to link him with the major conspirators, despite his concededly insignificant role in the alleged transgressions?

Petitioner's guilt or innocence of the crimes charged against him depended upon whether he conspired to, and did, knowingly sell unregistered control stock of the United Dye and Chemical Corporation, and manipulate the price of that stock on the Exchange. The prosecutor expressed the view that petitioner could have been tried in four days.

* With the help of a court appointed lawyer [illegible] his innocence" to the Supreme Court. [illegible] Aug. 6, 1963, p. 21, col. 2.

time. Yet, despite timely applications for a severance, petitioner was forced into an 11-month trial best described as a battle of attrition. By far the greater part of the evidence involved crimes of co-conspirators no longer in the case and concerning which petitioner had no knowledge. The evidence also showed that he had absolutely no stake or complicity in those crimes—by which Guterma and his group looted public corporations and fraudulently created over a half-million shares of stock. Moreover, as the prosecutor's concession as to the length of time in which petitioner could have been tried recognizes, the illegal means by which the Guterma group created and acquired the control of stock was absolutely irrelevant to petitioner's guilt or innocence of the crimes with which he was charged—as irrelevant as would be proof that Guterma acquired the stock by robbing a bank.*

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* If this Court should grant certiorari, but ultimately decide the other questions raised against petitioner, a reversal of petitioner's conviction should result in any event, for it seems plain that the government failed to establish the existence of the single conspiracy charged in the indictment. As Judge Learned Hand held in *United States* v. *Peoni*, 100 F. 2d 401, 403 (CA 2, 1938):

> "Nobody is liable in conspiracy except for the fair import of the concerted purpose or agreement as he understands it * * *."

In *United States* v. *Falcone*, 109 F. 2d 579, 581 (CA 2, 1940), aff'd, 311 U. S. 205 (1940), he held that for one to join in the conspiracy of others:

> "* * * he must in some sense promote their venture himself, make it his own, have a stake in its outcome."

In *United States* v. *Andalaftch*, 112 F. 2d 503, 507 (CA 2, 1941), he warned:

> "It is true that at times courts have spoken as though, if A makes a criminal agreement with B, he becomes a party to any conspiracy into which B may enter, *or may have entered*, with third persons. That is of course an error; *the scope of the agreement actually made always measures the conspiracy*, and the fact that B engages in a conspiracy with others is as irrelevant as that he engages in any other crime." (Emphasis added.)

The question is squarely presented whether petitioner was deprived of due process of law, guaranteed by the Fifth Amendment, by the imposition of a mass conspiracy trial which compelled him to run the gantlet of an 11-month trial, when, in both the trial court's and the prosecutor's view, petitioner's involvement in the case was minor and he could have been tried in a "matter of four days." It would seem that in this day, when the mass conspiracy trial is more and more common, this important question in the administration of federal criminal law should be resolved by this Court.

The prosecutor, who in oral argument on appeal blandly conceded that petitioner could have been tried in a matter of four days, opposed all applications for a severance. He was bent upon "winning his case" and apparently felt that by trying petitioner with the "Guterma group" he would enhance his chances for "success." His bland concession, after conviction, as to the length of time in which petitioner could have been tried, can only be taken as some evidence of a deliberate and calculated design to adduce evidence against petitioner which otherwise would have been incompetent and inadmissible. The attempt to establish guilt by association in reliance upon the fact that, as this Court has already observed, it is "unmitigated fiction" to assume that instructions will repair the damage, was clearly violative of petitioner's constitutional right to a fair trial.

Since it is conceded that petitioner could have been tried in less than a week, it was "harassment" and "oppression" to compel him to run the gantlet of an 11-month proceeding wherein the evidence revealed enormous crimes with which it is conceded petitioner had absolutely nothing to do. The actions of the trial court and the prosecutor violated petitioner's right to a fair trial and traduced the spirit, if not the letter, of the decisions of this Court in *Pickingate v. United States*, 367 U. S. 556 (1961); *Abbate v. United States*, 359 U. S. 187 (1959); *Bartkus v. Illinois*, 359 U. S. 121 (1959) and *Cicci v. Illinois*, 356 U. S. 571 (1958). In each of those decisions this Court has expressed a senti-

ment which condemns the "oppressive use of the criminal trial" or official "harassment" for the purpose of gaining unfair advantage of a defendant. Although the cases cited involve harassment by multiple trials, it would seem plain that the principle may be applied to the case at bar. If, as is clear and as is conceded, petitioner could have been tried in less than a week, then to subject him to an 11-month trial, during which he could have been tried 44 times, is oppression of the first order.

> "This is an unseemly and oppressive use of a criminal trial which violates the concept of due process . . . whatever its ultimate scope is taken to be." *Cinco* v. *Illinois*, *supra*, at 575 (Douglas, J., dissenting.)
>
> "The prime consideration is the protection of the accused from the harassment . . . and not the justification for or policy behind the statutes violated by the accused." *Abbate* v. *United States*, *supra*, at p. 200 (Brennan, J.)

In his dissenting opinion in the *Piemonte* case, *supra*, at 564, Chief Justice Warren declared that unjustifiable harassment violated the Fifth Amendment.

That the Fifth Amendment does not tolerate what happened here seems to petitioner to be absolutely certain, for "a principle to be vital must be capable of wider application than the mischief which gave it birth," and "[i]n the application of a constitution . . . our contemplation cannot be only of what has been but of what may be." *Weems* v. *United States*, 217 U. S. 349, 373 (1910).

The caution of Judge Cooley, in his monumental work on the Constitution, is appropriate:

> "In this country, where officers are specially appointed or elected to represent the people in these prosecutions, their position gives them *immense power for oppression;* and it is to *be feared* they do not always sufficiently appreciate the responsibility, and wield the power with due regard to the legal rights and privileges of the accused . . ."

> "It is the *duty of the prosecuting attorney* to treat the accused with *judicial fairness*; to inflict injury at the expense of justice is no part of the purpose for which he is chosen. *Unfortunately*, however, we sometimes meet with cases in which these officers appear to regard themselves *as the counsel for the complaining party rather than impartial representatives of public justice.*" 1 Cooley, Const. Lim. (8th Ed.) 646. (Emphasis added.)
>
> See: *Curtis* v. *State*, 6 Gold. 9.

Judge Learned Hand, in *United States* v. *Falcone*, 109 F. 2d 579, 581 (CA 2, 1940) aff'd 311 U. S. 205 (1940), aptly observed:

> ". . . today when so many prosecutors seek to sweep within the dragnet of conspiracy all those who have been associated in any degree whatever with the main offenders. That there are *opportunities of great oppression in such a doctrine is very plain*, and it is only by circumscribing the scope of such all comprehensive indictments that they can be avoided." (Emphasis added.)

Particularly when, after 50 trial days, petitioner's counsel became ill and petitioner renewed his motion for a severance, did the trial court have an affirmative "duty" to sever petitioner. Actually he should never have been joined in the trial at the outset. The conclusion is virtually irresistable that it was expected that he would, as did most others, agree to plead guilty to parts of the indictment against him. The lever employed by the government —its ability to prove to a jury his "guilt by association" at trial and to inflict upon him the financial ruin wrought in the wake of an over 11 month trial, cannot escape scrutiny by this Court. No jury could possibly be expected to separate and distinguish between evidence admissible as to one defendant and not another, or incriminating of one and not another, especially after an eleven month trial and a record exceeding 26,000 pages in length.

How could petitioner possibly have obtained a fair trial in the light of the foregoing facts, to say nothing of the other errors and the denial of his right to counsel? That instructions to a jury to disregard evidence is a fatuous and futile gesture has been repeatedly recognized.

> "The naive assumption that the prejudicial effects can be overcome by instructions to the jury, cf., Blumenthal *v.* United States, 332 U. S. 539, 559, 'all practicing lawyers know to be unmitigated fiction.'". Krulewitch *v.* United States, 336 U. S. 440, 453 (J. J.).
>
> ". . . the recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody else's." (L. Hand, J.) Nash *v.* United States, 54 F. 2d 1006, 1007 (C.A. 2, 1932).

Even the Court of Appeals below observed (App. 1287):

> "Those entrusted to make the laws have placed the crime of *conspiracy* on the books and it has not been repealed despite the fact that *throughout the ages* it has been largely responsible for multi-defendant trials and the *admission of evidence otherwise inadmissible.*" (Emphasis added)

That this trial was actually a battle of attrition is evidenced by the fact that of the 33 defendants named, only five participated in the trial to its conclusion. Thirteen defendants pleaded guilty before or during the trial.*

* The fact that 9 defendants pleaded guilty at various times *during* trial, coupled with the trial judge's "cautionary" instructions, itself made a fair trial impossible. One juror related, on voir dire, that he had read that 3 defendants pleaded guilty (1133-38). One defendant, who, during trial, pleaded guilty, took the witness stand for the government and told that he pleaded guilty (1548-96). The judge instructed the jury after the pleas were received that those defendants had been disposed of "with respect to their guilt on this indictment" (9646) and that their fate rested in his "hands" (9567, 9646, 14698). The Court of Appeals, while observing that "the jury could not have been unaware of these pleas" and that they constituted a "real danger" to other defendants, held that the trial judge's instructions and charge "met the law's protective requirements." If the Court of Appeals was correct, it would be salutary for this Court to review the adequacy of the law's "protective requirements."

It was therefore extremely urgent that the Court protect petitioner against prejudice and in this duty it erred in not granting a severance.

When the petitioner pleaded for a necessary and realistic adjournment to obtain counsel, the Court compromised his rights and relegated them to those of the other defendants who naturally objected to an adjournment.

The vice of the mass trial and the incredible 11 months it consumed is dramatically illustrated by the opinion of the Court below which continually pooh poohs errors on the ground that in the context of the very long trial they must be overlooked.

> "To set forth any detailed refutation of these charges might well require a restatement of the court's 450 page charge. Any such procedure would only add needlessly to the ever expanding law reports." (App. 23a)

But, why shouldn't the defendants be entitled to know how the Court decided their contentions? How can this Court possibly determine whether the petitioner received "due process" on his appeal? There are other instances where the Circuit Court "overlooked" error in deference to the length of trial.

In *Krulewitch* v. *United States*, *supra*, at 457, after a survey and criticism of the federal law of conspiracy, Justice Jackson declared:

> "There is, of course, strong temptation to relax rigid standards when it seems the only way to sustain convictions of evildoers. But statutes authorize prosecution for substantive crimes for most evildoing without the dangers to the liberty of the individual and the integrity of the judicial process that are inherent in conspiracy charges. . . . And I think there should be no straining to uphold any conspiracy conviction where prosecution for the substantive offense is adequate and the *purpose served by adding the conspiracy charge seems chiefly to get procedural advantages to ease the way to conviction.*" (Emphasis added)

One of Justice Jackson's criticisms of the federal law of conspiracy was that it reduced the Sixth Amendment right to trial to a sham. Referring to *Hyde* v. *United States*, 225 U. S. 347 (1912), he said (at 452-3):

> "Mr. Justice Holmes, 'on behalf of himself and Justices Hughes, Lurton and Lamar, wrote a vigorous protest which did not hesitate to brand the doctrine as oppressive and as "one of the wrongs that our forefathers meant to prevent."'"

In *Kotteakos* v. *United States*, 328 U. S. 750, 773 (1946), where, *as here, a single conspiracy was alleged, but multiple conspiracies were proved*, this Court, *reversing for this reason*, stated that the proceedings of a mass trial "are exceptional to our tradition and call for the use of every safeguard to individualize each defendant in his relation to the mass," and continued:

> ". . . . Wholly different is it with those who join together with only a few, though many others may be doing the same and though some of them may line up with more than one group.
>
> "Criminal they may be, but it is not the criminality of mass conspiracy. They do not invite mass trial by their conduct. Nor does our system tolerate it. That way lies the drift toward totalitarian institutions. True, this may be inconvenient for prosecution. But our Government is not one of mere convenience or efficiency. It too has a stake, with every citizen, in his being afforded our historic individual protections, including those surrounding criminal trials. About them we dare not become careless or complacent when that fashion has become rampant over the earth."

Continued illustration of the ways in which the unnecessary 11 month trial prejudiced petitioner is unnecessary. The Court of Appeals' remark that the Court's charge to the jury consumed two days and over 950 pages of record (App. 23a) speaks for itself.

If ever a case epitomized the abusive employment of a mass conspiracy charge so that only a perversion of justice could result, this case does. It would be salutory for this Court to grant certiorari and review whether the Fifth Amendment tolerates what occurred here.

3. Whether petitioner was deprived of his constitutional right to confront and examine witnesses or to compulsory process for obtaining witnesses in his favor, when the trial judge forbade any questioning of the witness Smith following his invocation of the Fifth Amendment privilege?

A

Whether the privilege against self-incrimination protects only the accused as the Fifth Amendment clearly indicates, or extends protection to any witness at all?

Several important questions in the administration of federal criminal justice are raised by the trial judge's actions in allowing the witness Smith to invoke the Fifth Amendment privilege and in denying petitioner's application to put prepared questions to the witness in the presence of the jury.

The question arises at the outset whether a witness, as compared to an accused or one himself under investigation in the proceedings at hand, may properly invoke the privilege to remain silent.

The Fifth Amendment guarantees that:

> "No person . . . shall be compelled *in any criminal case* to be a witness *against himself* . . . ."

It is apparent that the language of the Constitution refers to an accused and not a witness.

> "Taken by themselves the words *nor can he be compelled to give evidence against himself* are, doubtless, broad enough to include a witness as well as an accused. But occurring in a sentence beginning with the words *in all capital or criminal prosecutions*, and sandwiched as they are between clauses which can only relate to the accused, they seem unmistakably intended to apply only to him: a conclusion which the word *he*, already used just a few words previously to refer unmistakably to the accused, strongly reinforces.
>
> . . . "Quite clearly, had the framers of these provisions intended them to include the witness, the

> fact that the context might be construed as negativing such a construction would have been apparent to them; and they would have rewritten the provision to remove the ambiguity.' One must conclude that the thought that the witness might be regarded as included never occurred to them. And the reason why it did not seems clear." Mayers, *Shall We Amend The Fifth Amendment* (1959) at 187.

In a footnote, the same author notes that the supposition that a "witness" as well as an accused is protected by its terms is probably owing to a misunderstanding of the Amendment:

> "It [the privilege against self-incrimination] was in fact unknown in the nineteenth century. It does not occur in either of the two historic Supreme Court decisions on the privilege toward the end of that century (the Boyd decision in 1886 and the Counselman decision in 1892). It does not occur in the 1891 edition of Story's *Commentaries on the Constitution* or in the 1893 edition of Greenleaf's *Evidence* – both standard works of the period."
>
> Mayers, id. at 311, 312 footnote 16.

Thus, in addition to the fact that petitioner was not given a severance and was not even afforded effective representation of counsel, the trial judge did not allow him to question the one witness who could have exculpated him entirely or at least attenuated the virulent effect of Barkley's testimony.

In light of the extraordinary hardship caused petitioner by such supposition in this case, the question is raised whether this Court should not grant certiorari and review this exceedingly important question in the administration of federal criminal justice.

Even if it be conceded that the priyilege against self-incrimination protects witnesses, other serious questions are raised by the trial court's actions.

In *United States* v. *St. Pierre*, 132 F. 2d 837, 840 (CA 2, 1942), Judge Learned Hand observed:

> "The result of using this, like any other privilege, is to deprive people of evidence which would be otherwise available; at best, a disastrous necessity, for disputes ought to be settled so far as they can by resort to the whole truth."

The privilege is designed and interpreted "to protect the innocent" even though it may prove "a shelter to the guilty." *Twining* v. *New Jersey*, 211 U. S. 78, 91 (1908).

Ironically, however, the privilege was perverted in this case and was applied in a manner clearly destructive of the policy behind it—the protection of the innocent. It barred petitioner from putting the lie to unfavorable evidence against him given by a witness with an obvious motive to seek to win favor with the prosecutor. Even if the witness had the privilege to invoke, the Court committed egregious error in denying petitioner the right to put the questions to the witness in the presence of the jury.

Petitioner did not intend to, and could not, abuse the opportunity to question the witness despite his expressed intention to invoke the Fifth Amendment. He only sought permission to put *prepared* questions to the witness, revealed to the trial judge, and already answered by the witness in a manner favorable to petitioner.

The trial judge acted on the erroneous premise that the Fifth Amendment prohibits inquiry. Thus he stated, in denying petitioner's application to put the question to the witness:

> "If your questions are improper in the light of what has developed then the jury is not entitled to consider the asking of the questions in its function as a deliberative body. The witness is excused." (23202)

However, the Court was plainly wrong. The questions to be put to the witness were entirely competent and relevant. The witness was merely privileged not to answer them—as probative as they were. Actually, "except in the case of an *accused* in a criminal case [for an accused cannot be called as a witness, the privilege against self-incrimination] is merely an option of refusal, not a prohibition of inquiry." 8 *Wigmore on Evidence* (3d Ed) § 2268, p. 402.

> "The right to trial by jury includes the right to have the jury present when competent questions are propounded to a witness. While a witness may refuse to answer if the answer would tend to incriminate him, yet the privilege does not bar the asking of the question." *O'Chiato* v. *People*, 214 Pac. 404, 405 (Sup. Ct., Colo., 1923). See also, *Hinds* v. *John Hancock Mutual Life Ins. Co.*, 155 A. 2d 721, 723 (Maine, 1959)

In *United States* v. *Benjamin*, 120 F. 2d 521 (CA 2, 1941), it was held that a witness, as compared to an accused, does not have the constitutional privilege of refusing to take the witness stand, but only the privilege of declining to give answers, when interrogated. Judge Augustus N. Hand, writing for the Court stated (at 522):

> "it is to be remembered that the appellant had not the constitutional privilege to refuse to testify which belongs to a defendant on trial. He was subject to call as a witness and only had the right of any witness to decline to give answers when interrogated which might tend to incriminate him. O'Connell *v.* United States, 2 Cir., 40 F. 2d 201, 205; Mullaney *v.* United States, 1 Cir., 79 F. 2d 566. As Professor Wigmore has said, the privilege is 'an option of refusal and not a prohibition of inquiry'. Wigmore, Evidence 2d Ed., § 2268."

Accord:

United States v. *Housing Foundation of America*, 176 F. 2d 665 (CA 3, 1949);

O'Connell v. *United States*, 40 F. 2d 201, 205 (CA 2, 1930);

United States v. *Miller*, 80 F. Supp. 979, 981 (E. D. Pa., 1948).

The Sixth Amendment again met with disfavor at the hands of the trial court. After depriving petitioner of his right to counsel, guaranteed thereby, he made empty petitioner's right to "compulsory process for obtaining witnesses in his favor." If the Court were obliged to balance the privilege of the witness under the Fifth Amendment with petitioner's right to process for obtaining witnesses in his favor, guaranteed by the Sixth Amendment, it should have at least afforded petitioner his right to put questions to the witness in front of the jury. The Court still could have enforced the witness' right not to answer, provided he invoked the privilege.

Rather than enable petitioner to impart to the jury the nature of the evidence which petitioner sought to present to it, petitioner's witness was dismissed by the Court with instructions that the jury was not to infer that the witness' reliance on the privilege was evidence *against* petitioner. Here, the Court

> "having put a man on trial perhaps for his life, permits the privilege [5th Amendment], historically developed for his protection in this very situation, to be perverted into a deadly weapon against him at the pleasure of a possibly hostile witness . . ." Mayers, *Shall We Amend the Fifth Amendment*, supra, p. 118.

By its action, the trial court also deprived petitioner of the right to inquire of the witness under oath whether his assertion of the Fifth Amendment privilege was in good faith. Perhaps it was induced by others. Barkley or perhaps his new-found friend, the prosecutor. By Barkley's testimony, Smith was a salesman in a brokerage house which had already pleaded guilty to the indictment. Other

salesmen of "United Dye" stock were still under indictment, having been severed prior to trial. Perhaps Smith, with prodding by no one, decided for himself, that it would be best not to goad the prosecutor by giving exculpatory evidence for petitioner.

The Ninth Circuit has recently suggested that to influence a person to assert the Fifth Amendment privilege is an obstruction of justice. *Cole* v. *United States*, 32 L. W. 2491 (CA 9, 1964). The Court held:

> "One who bribes, coerces, forces, or threatens a witness to claim it [the Fifth Amendment] or advises with corrupt motives the witness to take it, and does himself obstruct or influence the due administration of justice."

In addition to all this, it seems plain that the trial judge erred in allowing the witness to assert the privilege. The witness was sought to be asked questions concerning his activities in 1956, as to which the statute of limitations had run. The judge dismissed the witness on the erroneous theory that his giving testimony might constitute a waiver of his right to remain silent as to his later, unrelated activities under investigation by the S. E. C.

The awful abuse to which the Fifth Amendment was put in this case calls for corrective action by this Court.

4. Whether the prosecutor and the Trial Court, in compelling petitioner to expend his entire personal fortune to defend himself in an eleven-month trial when, without prejudice to the Government he could have been tried in less than a week, imposed upon petitioner cruel and unusual punishment or an excessive fine, in violation of the Eighth Amendment?

Despite the prosecutor's personal view that petitioner could have been tried in a matter of four days, he strenuously opposed petitioner's application for a severance and thereby caused petitioner to wage, as best he could, the battle of attrition which was the trial of the indictment. That petitioner's guilt or innocence of the crimes with

tioner. It has been stated by this Court (*Weems* v. *United States*, 217 U. S. 349, 368-9, 371, 373 (1910)) that "[w]hat constitutes a cruel and unusual punishment has not been exactly decided. . . . What is understood by excessive fines? It lays with the court to determine . . . ."

Also:

> "The whole inhibition is against that which is excessive in the bail required or fine imposed, or punishment inflicted . . . We cannot think that the possibility of a 'coercive cruelty' being exercised through other forms of punishment was overlooked. We say 'coercive cruelty' because there was more to be considered than the ordinary criminal laws."

This Court also stated in *Weems*, *supra*, at 373, that:

> "Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, necessarily be confined to the form that evil had heretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions."

And in *U. S. ex rel. Pitcher*, 101 F. Supp. 285, 288 (1951), the District Court of Alaska observed:

> "Reason, if not authority, indicates that the protection of the Eighth Amendment extends not only to those convicted, but to those held for trial . . . ."

The question is presented whether the government's choice to force petitioner to run the gantlet of an eleven-month trial when, concededly, he could have been tried in less than a week, is not the "infliction [of] injury at the expense of justice" which should prompt this Court, in the exercise of its supervisory function, to grant review. *McNabb* v. *United States*, 318 U. S. 332, 340.

It would seem that, if the government's actions with respect to petitioner be countenanced, an over-zealous prosecutor may inflict punishment upon one whom he merely suspects of a crime.

The language of this Court in *Weems*, *supra*, clearly offers reason for belief that the employment of an eleven-month mass conspiracy trial to exhaust a defendant physically and financially where he was able to be tried in a mere fraction of that time, is within the prohibition of the Eighth Amendment.

5. Whether the rules permitting the Government to join petitioner in a mass conspiracy trial consuming over eleven months' time and to thus virtually ruin petitioner financially are, in effect, and as practiced, bills of attainder (pains and penalties), since petitioner was not entitled to determine whether he should be tried separately or jointly, it being a matter for the prosecutor and the Court to determine?

Under Rules 8 and 14 of the Federal Rules of Criminal Procedure, the prosecutor is empowered to join several defendants in an indictment or to consolidate indictments for trial. Only if a defendant is in a position to show inordinate legal "prejudice" and an "abuse of discretion" on the part of the trial judge is he entitled to a severance. *Pointer* v. *Arkansas*, 151 U. S. 396 (1894); *Stilson* v. *United States*, 250 U. S. 583 (1919). Unfortunately, the "extra-legal" prejudice caused petitioner by the joint trial below was not an element considered by the trial court in determining petitioner's application for severance. Moreover, petitioner was not entitled to insist, as of right, upon a special proceeding or trial, wherein his guilt could be individually tried.

The application of Rules 8 and 14 in this case had the effect of foisting petitioner into the horror of an eleven-month trial although, the government conceded, he could have been tried in less than a week. Petitioner's right to an appeal to test the propriety of the joinder or failure

to award a severance is meaningless, for the financial destruction, by then, is already achieved.

A Bill of Pains and Penalties is a legislative Act, without a judicial trial, which imposes a punishment less than death. Such Bills are within the constitutional prohibition against *Bills of Attainder*. *Dechmen v. State*, 8 Wall 595, 601; 16A C. J. S. Const. Law, p. 452, 455.

In *United States v. Lovett*, 328 U. S. 303, 322, this Court explained:

> "Bills of Attainder were part of what now are staple judicial function which legislatures then exercised. It was thus part of their recognized authority which the Constitution prohibited when it provided that 'No Bill of Attainder . . . shall be passed'".

In *Cummings v. Missouri*, 4 Wall 277, 320 (1866), this Court recognized that the deprivation of any right, social or political, formerly enjoyed by an individual, could be deemed a Bill of Attainder. The question is raised whether the infliction of financial ruin and deprivation of the right to earn a living through an unnecessarily protracted trial is not a "Bill of Attainder" violative of the Constitution.

The argument that expense and the deprivation of a right to earn a living is a necessary circumstance of any trial is not persuasive, for the eleven-month trial foisted upon petitioner was not a necessary circumstance. In *Cummings*, *supra*, at 320, this Court held that the "circumstances attending and causing" the deprivation are determinative.

> "The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact."

"That Rule 8 and 14 are rules of procedure rather than substantive legislation, does not, as applied here, strip them of the character of "Bills of Attainder." If the Rules or

Criminal Procedure, may be employed to effectuate a destruction or confiscation of personal funds by foisting upon an accused an unnecessarily protracted mass trial, then corrections are necessary.

Conclusion

For the reasons stated above, and such additional reasons as may be advanced by other petitioners in this case, it is prayed that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Second Circuit herein.

Respectfully submitted.

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APPENDIX

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 187—September Term, 1963
(Argued December 5, 1963 Decided March 17, 1964.)
Docket No. 28030

UNITED STATES OF AMERICA
Appellee,

—v.—

VIRGIL D. DARDI, ROBERT B. GRAVIS, CHARLES ROSENTHAL and CHARLES BERMAN,
Defendants-Appellants.

Before:

MOORE, FRIENDLY and KAUFMAN,
Circuit Judges.

Appeal by four defendants from judgments of the District Court for the Southern District of New York, entered after a jury trial, William B. Herlands, *Judge*, convicting them of conspiracy to sell unregistered securities in violation of 15 U. S. C. §§77(e)(a), e(c), q(a) and X, 78i(a), j(b) and ff(a), 18 U. S. C. §1341, Rules and Regulations Promulgated by the Securities and Exchange Commission, and to defraud the United States by impeding the function of the Securities and Exchange Commission; convicting Dardi of substantive counts under 15 U. S. C. § 78i(a)(2), (a)(6) and ff(a) and 18 U. S. C. §2; and, convicting Gravis, Rosenthal and Berman of substantive counts under 15 U. S. C. §§77e(a)(1), 77x and 18 U. S. C. §2.

Affirmed.

FELDMAN, KRAMER, BAM & NESSEN, New York, N. Y. (Maurice N. Nessen and Merton Sarnoff, of counsel), *for appellant, Virgil D. Dardi.*

IRWIN L. GERMAISE, New York, N. Y. (Bernard B. Polak, of counsel and Phillip C. Samuels, on the brief), *for appellant, Robert B. Gravis.*

JOHN A. VASSALLO, New York, N. Y., *for appellant, Charles Rosenthal.*

GALLOP CLIMENKO & GOULD, New York, N. Y. (Milton S. Gould and Jonathan W. Lubell, of counsel), *for appellant, Charles Berman.*

GERALD WALPIN (Robert M. Morgenthau, United States Attorney for the Southern District of New York, Peter H. Morrison, Robert J. Geniesse and Gerald Abrams, Assistant United States Attorneys, of counsel), *for the United States of America.*

MOORE, *Circuit Judge:*

Four defendants, Virgil D. Dardi, Robert B. Gravis, Charles Rosenthal and Charles Berman, appeal from judgments of conviction that followed a jury verdict in which they were found guilty of unlawfully participating in the distribution of unregistered shares of United Dye and Chemical Corporation stock. Appellant Dardi was President and a Director of United Dye, a company long traded on the New York Stock Exchange. Appellants Berman, Gravis and Rosenthal were broker-dealers who dealt in the sale of stock in the over-the-counter market.

Opinion of the Court of Appeals

The Indictment

The indictment, which named thirty-three defendants and seventeen co-conspirators, contained thirty counts arranged in three general categories: Conspiracy (Count 1), market manipulation (Counts 2-5) and sale of unregistered securities (Counts 6-30). Because of severances and pleas of guilty, of the thirty-three defendants only the four appellants and one corporate defendant participated in the trial to its completion.[1]

Count 1 charged a conspiracy, 18 U. S. C. § 371, by Dardi, Berman, Gravis, Rosenthal and others illegally to sell unregistered United Dye stock to the public in violation of specified sections of the Securities Act of 1933 (15 U. S. C. §§ 77e(a), 77e(c), 77q(a), 77x), the Securities Exchange Act of 1934 (15 U. S. C. §§ 78i(a), 78j(b) and 77ff(a)), Rules and Regulations promulgated under both acts by the Securities and Exchange Commission, the Mail Fraud Statute (18 U. S. C. § 1341), and to defraud the United States by impeding the functions of the Securities and Exchange Commission (SEC). The methods used to obtain control of United Dye, the use made of other com

[1] Prior to trial, the following defendants were severed: I. Vincent Powell, Michael Kramer, Murray Porter, Edward Stone, Vincent P. Barry, Oscar L. Gould, Jacob Klein, Albert Wood Moore, Garry Hochman, Robert Allen and Charles Landeau, all characterized by the Government as "salesmen"; Defendants Louis Levin and G. F. Rothschild, Inc. were also severed prior to trial.

Four defendants entered pleas of guilty to portions of the indictment prior to trial: McGrath Securities Corporation (Counts 1, 6, 7, 8, 9, 17, 18 and 19); I. F. Stillman Inc. (Counts 1, 15, 27 and 28), Sidney Barkley (Count 1) and Irving Frank Stillman (Count 1).

Nine defendants pleaded guilty during trial: Samuel S. Garfield (Count 1); Allen K. Swann (Count 4); Allard Roen (Count 1); Herman W. Brann (Counts 4 and 5); Irving Pasternak (Counts 1, 6, 7, 8, 9, 20, 24, 27, 29 and 30); Garland L. Culpepper, Jr. (Counts 1 and 10); Rockwell Securities Corp. (Counts 1 and 10); Joseph Herbert Lederer (Count 1) and J. H. Lederer & Co. (Counts 1 and 30). Cornelius DeVroedt was severed due to illness; thereafter, Cornelius DeVroedt, Inc. entered a plea of *nolo contendere* to Counts 1, 24, 25 and 26.

panies such as Franklin County Coal Corporation and Handridge Oil Corporation, the illegal sale of unregistered stock and the illegal market manipulations were set forth in twelve detailed paragraphs and subparagraphs. The thirty-two overt acts alleged in the indictment included specific meetings and letters. Counts 2, 4 and 5 charged Dardi, Garfield, Pasternak and others with illegally pegging and stabilizing the price of United Dye stock on the New York Stock Exchange. In counts 6 through 30 the broker-dealers, Rosenthal, Berman, Gravis and others, were charged with the use of the mails in connection with specific sales of United Dye stock.

Each appellant was convicted on the first count. Dardi was convicted on each of three market manipulation counts under 15 U. S. C. § 78i(a)(2), (a)(6) and 78ff(a) and 18 U. S. C. § 2.[2] Berman, Gravis and Rosenthal were convicted on counts charging the illegal sale of unregistered United Dye stock in violation of 15 U. S. C. § 77e(a)(1), 77x and 18 U. S. C. § 2.[2]

I.

Outline of the Evidence.

As an overture to an analysis of the many legal and factual grounds urged for reversal, it is necessary to describe in brief outline the factual background against which the case must be viewed. The Government's case was constructed principally on the testimony of Alexander L. Guterma, the Chairman of the Board of United Dye and the central figure in the complex chain of transactions which he described to the jury. The Government alleged, and the

[2] The jury found Rosenthal not guilty on Count 15, Berman not guilty on Counts 14, 24, 25 and 26 and Gravis not guilty on Count 16. Defendant R. B. Gravis, Inc. was convicted on Counts 1 and 29, but found not guilty on Count 16.

jury must have found, the existence of a single multi-stage conspiracy which had as its central purpose distribution to the public of unregistered United Dye stock. In the preliminary stages of the scheme, the conspirators gained control of United Dye and created a corporation with which it was later merged, Handridge Oil Company. As a result of the Handridge-United Dye merger, the conspirators obtained 575,000 "control" shares of United Dye stock. Shortly thereafter, through manipulation of the market on the New York Stock Exchange and misleading and fraudulent statements to customers the shares were sold in the over-the-counter market without the registration required by the federal securities laws. A résumé of Guterma's testimony on direct examination supplies most of the details on which these ultimate facts were grounded.

Preparations for the Merger of United Dye and Handridge Oil

In June of 1955, Guterma joined defendants Samuel Garfield and Irving Pasternak in their efforts to acquire the Franklin County Coal Corporation. Guterma testified that his partnership with Garfield and Pasternak was for the purpose of merging Franklin, then owned by John and Clint Murchison, Jr., with a company listed on either the New York or American Stock Exchange and then selling the stock of the listed company as thus acquired. Franklin's two major assets, coal lands in Illinois, long inactive, and an oil pipeline in Wyoming, had been unable to muster a profitable return for several years. To effect the sale, Garfield and Pasternak gave their promissory note for $510,000 as the full purchase price, leaving the stock with the Murchisons as security. The only cash to change hands at this point was a loan of $300,000 from Garfield, Pasternak and Guterma to Franklin to redeem a like amount in mortgage debt to the Murchisons.

Since the Franklin stock was pledged with the Murchisons, and would be unavailable for a merger with a more substantial corporation, Guterma, Garfield and Pasternak found it necessary to improvise on their original plan. To this end Swann, their attorney, formed Handridge Oil Corporation to which Garfield and Pasternak conveyed their interest in Franklin. In exchange, the 500,000 shares of Handridge were transferred to Swann, "in trust" for the three partners. Guterma testified, however, that subsequently much of the Handridge stock was held by nominees, to disguise Guterma's, Garfield's and Pasternak's status as "control persons" under the 1933 Securities Act.

Meanwhile, Guterma had become acquainted with Dardi, already an officer and director of United Dye, and in the latter part of June, 1955, had agreed to purchase a block of 38,500 shares of United Dye stock through Dardi at ten dollars per share. There were at this time about 168,983 shares of United Dye outstanding. Soon thereafter, Guterma distributed about two-thirds of the 38,500 shares as follows: Pasternak, for himself and Garfield, bought 12,000 shares; 1,000 shares each went to co-conspirators Robert Eveleigh, a Guterma aide, and Robert Leonhardt, owner of McGrath Securities Corporation, a defendant brokerage house which was later to sell United Dye shares; and Dardi retained an option, later exercised, to buy 6,500 shares to complement the 17,700 shares he already held. By early September, 1955, Guterma had been elected Chairman of the Board, Dardi President, Eveleigh Treasurer, and Alexander Timm, one of Dardi's associates, Assistant Secretary.

While Guterma was establishing himself at United Dye, he discussed with Dardi the prospects of a merger between United Dye and Franklin County Coal. A committee of United Dye Directors, including Dardi, was appointed to look into the proposal. Originally, Guterma represented Franklin in the negotiations with the committee but when he became a director, he negotiated on behalf of United

Dye with Pasternak and Swann. The proposed merger was also discussed with the Committee on Stock Lists of the New York Stock Exchange, which eventually granted United Dye's application to list the additional shares to be issued in the merger. In early December 1955, a merger agreement was executed under which United Dye was to issue 575,000 shares of its stock (then selling at approximately $30 per share) in exchange for the 575,000 shares of Handridge. Handridge was required to have at the closing, in addition to unencumbered Franklin shares, $750,000 in cash. Guterma testified that this $750,000 actually came from the sale of 75,000 Handridge shares to, among others, United Dye directors, including Dardi, who concealed their ownership through an escrow agent.

To Guterma the then inflated price of United Dye stock was not conducive to execution of the merger, and he discussed the situation with Dardi and Hyman Lehrich, also an officer and director of United Dye, as well as with Garfield and Pasternak in October 1955. To meet the problem without running afoul of the securities laws governing the sale of control stock, Guterma and Pasternak entered into a series of "loan" agreements with various "borrowers," in fact nominees, who immediately sold the "borrowed" stock reaping substantial profits in the process. The Government also adduced evidence that coincident with the sales of Guterma and Pasternak, Dardi through nominees disposed of the 6,500 shares he had purchased from Guterma under the June 1955 agreement. The cumulative effect of the sale of substantially the whole 38,500 share block achieved the desired result of driving the price of United Dye from a high of $38 per share in November 1955 to approximately $16 on May 1, 1956 when the merger was to close.

Effectuation of the Merger of United Dye and Handridge

The merger agreement between United Dye and Handridge stipulated that Handridge was to own, at the date of the merger, the Franklin stock, then pledged with the Murchisons as security for Garfield and Pasternak's $510,000 note, free and clear. Garfield and Pasternak, according to Guterma, did not have the funds to pay off the note. Therefore, Guterma, Dardi, and Lehrich, in April 1956 caused the merger agreement to be modified to delete the free and clear requirement and to provide that United Dye would assume the note and that Garfield and Pasternak would pay United Dye $510,000 plus the $9,000 interest that had by then accrued.

Bon Ami

About this time Dardi learned that 63,000 shares of the Bon Ami Company, which had over $3,000,000 in liquid assets, were available for purchase. By May 1, 1956 Dardi had executed an agreement with certain Bon Ami stockholders which provided for United Dye's payment of $1,350,000 (to be borrowed from Guterma's F. L. Jacobs Corporation) and the delivery of its $350,000 promissory note in exchange for 63,000 Bon Ami shares.

Guterma testified that control of Bon Ami was acquired to enable Garfield and Pasternak to satisfy the $519,000 obligation owed by them to United Dye. Moreover, his testimony, as well as other evidence on this phase of the case, could well support the conclusion that the Bon Ami treasury after the merger was used to satisfy the obligations incurred by United Dye in the very process of acquiring its 63,000 Bon Ami shares. To substantiate Guterma's testimony, the Government introduced evidence of various "loan" transactions involving Garfield and Pasternak and, as Directors of Bon Ami, Guterma and Dardi. Immediately after the merger, the Bon Ami Executive Committee formed a subsidiary, B. A. Royal-

ties, Inc., which was used as a conduit for transferring $860,000 of Bon Ami funds to Garfield and Pasternak. Out of the $860,000 Garfield and Pasternak, by check back dated to May 1, 1956, paid $519,000 to United Dye in payment of their note to the Murchisons; and, at the same time, they transferred $140,000 to United Dye, purportedly as a loan. Subsequently, so that Bon Ami would be repaid, Bon Ami transferred to Diversified Oil & Mining Corporation (D. O. M.), recently organized and controlled by Guterma, Garfield and Pasternak, $1,250,000 in exchange for a similar amount in D. O. M. debentures secured by D. O. M.'s properties. The same day, D. O. M. transferred $915,000 to Garfield and Pasternak, purportedly in partial payment for oil properties, although those properties had been previously pledged to Bon Ami, and $250,000 to United Dye as a loan. From the $915,000 received from D. O. M., Garfield and Pasternak repaid the original $860,000 loan from Bon Ami. According to the Government, the final step in this series of transactions was the payment by United Dye of the obligations it had incurred in its purchase of Bon Ami, $1,700,000.

The Garfield and Pasternak Guarantee

Under the United Dye-Handridge merger agreement, Garfield and Pasternak had guaranteed that the Franklin pipeline would, for each of the years 1956 and 1957 receive a minimum profit before amortization and depreciation of $1,200,000. As security, Garfield and Pasternak pledged 85,000 United Dye shares they had received in the merger to United Dye. Less than two months after the merger, Guterma recommended to the United Dye Board that this guarantee be waived in return for a cash payment of $800,000. As it happened, according to Guterma, Garfield and Pasternak transferred to United Dye $450,000 in cash (obtained partially from United Dye and partially from D. O. M.) and 115,000 shares of D. O. M. stock, arbitrarily

valued at $250,000 although actually worth only $184,000. In return, they obtained the [redacted],000 shares, then worth $1,299,000, which could be sold in the forthcoming distribution.

Sales to the Public of United Dye Shares Issued in the Merger

The third objective of the Guterma-Garfield-Pasternak partnership was the sale to the public of 500,000 shares of United Dye, amounting to more than 50 per cent of the stock outstanding, acquired in the May 1956 merger. To avoid the practical and legal difficulties attendant upon the sale of such a large block on the New York Stock Exchange, the three partners had agreed to sell the shares in the over-the-counter market. It was at this point, during the summer of 1956, that the broker-dealers commenced their operations. While the United Dye stock was being stabilized artificially on the Stock Exchange, the broker-dealers (enlisted by Guterma), primarily by way of hard-selling long distance telephone calls and misleading tout sheets (so-called "boiler room" tactics), sold the stock to the public, knowing that no registration statement had been filed. The firms involved, including I. F. Stillman, Inc. (appellant Rosenthal), R. B. Gravis, Inc. (appellant Gravis) and C. F. Rothschild & Company (appellant Berman) were to be paid a fifteen per cent commission plus one dollar in cash for each share sold.

Stabilizing the Market

The success of the telephone sales campaign depended in large measure on the price at which United Dye was being traded on the stock exchange. To maintain the price, the shares sold initially over-the-counter had to be absorbed when offered on the Exchange. Consequently, Guterma made the necessary "pegging" arrangements with

his aid, Huges, defendant Brann, appellant Rosenthal, and defendant Sidney Barkley, Rosenthal's associate in I. F. Stillman & Co.

Before the merger, Guterma had instructed Hughes to watch the market price and to purchase any large amounts of United Dye stock for which there was no demand. Hughes complied by opening several brokerage accounts and purchasing in the name of relatives, friends and nominees. Hughes' efforts proved inadequate, however, when the boiler room sales began in earnest. To alleviate the problem, Dardi introduced Guterma to Brann who had expressed an interest in selling United Dye shares in Europe and in North Africa where he owned a bank. Brann could take advantage of 30 per cent margin, insure the anonymity of anyone conducting a market stabilization program, and tout the stock in his bank's market letter. An arrangement was agreed upon wherein Brann was to buy United Dye stock on the New York Exchange, the margin coming from Guterma, and then to sell the stock abroad. Although the Brann arrangement eventually bogged down as a result of Brann's alleged double dealing, the net result of the stabilizing efforts of Hughes, Brann, Rosenthal and Barkley proved successful.

The sales to the public and accompanying market manipulation, which lasted until early November 1956, completed the venture which Guterma, Garfield and Pasternak had undertaken a little over a year earlier, and in October they met at Clare, Michigan to discuss dividing the spoils amongst themselves. In April 1957 Guterma resigned from United Dye and began to sell the 83,000 shares he then owned. Dardi, according to Guterma, learned of these sales and, after reminding Guterma of Guterma's agreement to give him first preference, purchased 40,000 shares from Guterma at the then market price of $7.

II.

Sufficiency of the Evidence

Because a large portion of the errors asserted by appellants are bottomed on disputed questions of fact and sufficiency of proof, it is appropriate to advert to certain long established principles of appellate review. A jury of twelve has heard all the testimony, explanations of the meaning of a vast number of exhibits, and the exhaustive summations of counsel, and has been instructed on the applicable legal rules. Their verdict, after due consideration, was that appellants were, on the facts and the law, guilty of substantive crimes and of conspiracy. It was within the exclusive domain of the jury to choose between competing inferences of fact. *United States* v. *Gregorio*, 233 F. 2d 556, 563 (2d Cir. 1956), rev'd on other grounds, 353 U. S. 391 (1957). On appeal the evidence must be considered in a light most favorable to the Government. *United States* v. *Turino*, 269 F. 2d 488, 490 (2d Cir. 1959). Moreover, microscopic dissection of bits and pieces of evidence when laid out in a cold record overlooks the truism that "logically the sum if often greater than the aggregate of the parts, and the cumulation of instances . . . may have probative force immensely greater than any one of them alone." *United States* v. *White*, 124 F. 2d 181, 185 (2d Cir. 1941).

Substantive Counts (the Broker-Dealers)

The broker-appellants' convictions stem from their unlawful sales of unregistered stock. They do not dispute that they sold the stock or that it was not registered; rather, they claim that they were ignorant that the stock required registration at all. Section 5(a) of the Securities Act of 1933, 15 U. S. C. § 77e(a) sets up a general prohibition on

the sale of unregistered securities with certain exemptions.[3] No exemption is provided for an "underwriter" defined by the statute[4] as any person who offers or sells a security for an "issuer." An "issuer," in turn, is defined in terms of "control." Since the evidence clearly establishes that Guterma, Garfield and Pasternak were in "control," and since the broker-appellants sold for one or more such "issuers," each was an "underwriter" under the Act. See *United States* v. *Crosby*, 294 F. 2d 928, 939-40 (2d Cir. 1961), *cert. denied sub nom. Mittelman* v. *United States*, 368 U. S.

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[3] 15 U. S. C. § 77e(a) provides:

> Prohibitions relating to interstate commerce and the mails.
>
> (a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—
>
> (1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or
>
> (2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instrument of transportation, any such security for the purpose of sale or for delivery after sale.

[4] 15 U. S. C. § 77b(11) states:

> The term "underwriter" means any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any direct or indirect underwriting of any such undertaking; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commission. As used in this paragraph the term "issuer" shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer.

984 (1962). Through this circuitous route it is apparent that the crucial issue as to the broker-dealers' guilt is whether they knew that they were selling for a "control" group. In *United States* v. *Crosby*, *supra*, this Court found that there was insufficient evidence that the broker-dealers "knew or should have known that they were 'underwriters' in terms of the Securities Act." The evidentiary problem here is whether the link missing in *Crosby* has been supplied.

Berman

Berman has energetically undertaken the task of explaining away all the undesirable inferences that can be drawn from the evidence adduced against him. A similarly meticulous analysis of various transactions and meetings was urged to the jury. We set out here a few of the facts from which the jury might have justifiably chosen to disregard Berman's explanations of his conduct. Berman came to Guterma and asked how many shares of United Dye were available and what the compensation was. He was told that about 150,000 shares "could be sort of held for him on an option basis." When Berman pressed for more, he was informed that any amount he could sell would be forthcoming and that "there was in excess of 200,000 to 250,000 available." When Berman asked of compensation, Guterma said that brokers were getting 15 per cent by check and $1 in cash per share. Guterma also told him that the stock should be sold for a specific amount at the closing New York Stock Exchange price. There was also evidence tending to show that six "vendor" letters, addressed to Garfield, Pasternak, Swaim and three others were all sent instead to Swaim, with whom Berman dealt, and that these letters were a subterfuge. Perhaps, even more damaging was Guterma's testimony that, when Berman expressed concern about the drop in United Dye price, Guterma replied that

all efforts were being made regarding market stabilization and that Berman should not be disturbed about it.

Berman argues that it was only logical to ask the chief executive of a corporation if large blocks of shares were available for sale; that in discussing market price with Guterma he hoped that as Chairman of the Board Guterma would influence the market through legitimate corporate actions, and that the only inference that can be drawn from the "vendor" letters is that copies were sent to Swann in his representative capacity. Whatever the various inferences it *might* have drawn, the jury heard Berman's explanation of his conduct and discredited it. The evidence presented describing the circumstances of Berman's participation in the distribution is sufficient to support the jury's conclusion that he knew that his sales were for a control group.

Berman also asserts his good faith reliance on legal opinions that the stock was tradeable without registration, as did the broker-dealers in *United States* v. *Crosby*, *supra*. The *Crosby* case makes it clear, however, that reliance on the opinion of counsel is but one consideration which may be persuasive in the jury's determination of the defendant's state of mind. Among other factors which the jury could consider as going to Berman's good faith reliance on legal advice was the fact that the letters expressing the opinion that the stock could be sold without registration specifically made the assumption that the sales were not being made for "control" persons. And, as pointed out, the jury could have inferred that when these opinions were rendered Berman knew that he was dealing with control persons.

Gravis

Gravis first expressed his interest in selling United Dye to Hughes, who arranged a meeting with Guterma. Guterma told Gravis that the amount of available shares was in ex-

cess of one-half million, and assured him that these shares would not be sold on the Exchange so as to undercut the price. Guterma further informed Gravis that he could acquire shares for distribution, and that "the brokers" were receiving 15 per cent commission by check and $1 in cash. There was also evidence that Gravis was one of the brokers who sent periodic "confirmations" of sales to Hughes at United Dye. Finally there was evidence that Gravis made false statements to SEC Investigator Pitchardo from which the jury might have concluded that Gravis knew full well that his sales were unlawful and that Guterma was in a control position.

Rosenthal

Guterma's testimony alone provides a sufficient basis on which the jury could have decided that Rosenthal knew he was selling for Guterma and his control group. Guterma told Rosenthal that he (Guterma) and his "associates," Garfield, Pasternak, Swann and others, wanted to sell United Dye shares in the over-the-counter market. He further informed Rosenthal that the group controlled a total of approximately 550,000 shares and that "substantially all of these shares would be sold." In addition, testimony of Barkley, Rosenthal's former partner, was that he and Rosenthal had actively engaged in market "pegging" while the United Dye shares were being retailed, under Guterma's supervision.

The Conspiracy Count

The broker appellants make the complaint that the Government failed to prove the single conspiracy alleged in Count 1; that the proof showed that any conspiracy to sell securities to the public was independent of a separate and prior conspiracy involving the creation of the shares and their distribution to the co-conspirators and nominees. The

prejudicial effect of the mass of evidence introduced as to the activities of Guterma and his "executive" group, it is argued requires reversal on the substantive counts as well as the conspiracy count.

As was recently said in *United States* v. *Crosby*, *supra*, at 945, "'whether a scheme is one conspiracy or several is primarily a jury question, since it is a question of fact as to the nature of the agreement.'" In the case at bar the jury was so instructed.

There was abundant evidence to show the complicity of Guterma, Garfield and Pasternak, among others, in one plan consisting of a progression of carefully related transactions which had as its ultimate purpose the sale to the public of unregistered stock. Indeed, Guterma testified that this was precisely what his venture with Garfield and Pasternak was all about. But it is not fatal that the broker-appellants were not shown to have been aware of each part of the unlawful plan. See *United States* v. *Benjamin*, — F. 2d — (2d Cir. 1964); *United States* v. *Crosby*, *supra* at 945; *United States* v. *Aquesi*, 310 F. 2d 817 (2d Cir. 1962), *cert. denied*, 372 U. S. 959 (1963). It is only necessary to show that appellants knew of the conspiracy and that they associated themselves with it. *United States* v. *Beatrea*, 319 F. 2d 916, 928 (2d Cir. 1963), *cert. denied*, 32 U. S. L. Week 3212 (U. S. Dec. 10, 1963), *United States* v. *Aviles*, 274 F. 2d 179 (2d Cir. 1959), *cert. denied*, *sub nom. Genovese* v. *United States*, 362 U. S. 974 (1960).

We must conclude that there was sufficient evidence from which the jury could find that the broker-appellants knew that Guterma represented a control group acting in concert for the purpose of selling to the public unregistered stock. Upon the facts here, the sufficiency of the proof on the conspiracy count is bolstered by the determination of the adequacy of proof on the substantive count. See *United States* v. *Crosby*, *supra*, at 940.

III.

Conduct of the Trial

Dardi, apart from points dealing with claims of specific evidentiary errors, asserts that he was denied a fair trial (1) because of the trial court's failure to grant proper and timely pre-trial production of documents and a bill of particulars; (2) because of the extended duration of the trial and the court's toleration of "colloquy"; (3) because of the charge; and (4) because of unfair and discriminatory treatment by the trial court.[5]

Pre-Trial

Probably no experienced trial counsel has ever commenced a trial feeling that every necessary item had been fully and adequately prepared and that nothing remained to be done during the trial. If so, it is an experience enjoyed by very few. The usual pattern, particularly in the complicated and protracted case, is to spend most of the time after daily recess preparing for the morrow. And certain it is that trial counsel, if worthy of the title, never are satisfied that all possibilities of law and fact have been explored and that all the arguments essential to victory have been made. Limitations of time, space and the finite mind apply even to lawyers and it is against the background of this unfortunate but actual limitation that this trial must be viewed.

The indictment was filed on July 14, 1961. It was by no means in skeleton form. The conspiracy was alleged in detail and thirty-two overt acts were set forth. The particular statutes claimed to have been violated were set forth. The nature of the conspiracy, namely, the sale of unregistered stock; the rigging of the market and the fraudulent

[5] The other appellants join in these contentions.

sale to the public were alleged not in generalities but with reference to the specific means used for these purposes. The substantive counts dealing with market manipulation and sale were equally definite. Surely these appellants were adequately informed of the charges against them.

They complain, however, that they were not allowed sufficient pre-trial discovery and inspection and a detailed bill of particulars. In September 1961 defense counsel filed their motions for discovery and particulars. In December a single judge was appointed before whom all matters were to be heard. Early in February 1962 the court denied the motions. This denial, however, did not cut off the defense from information. On February 8, 1962 the Government served an eight-page bill of particulars and offered to make available some sixty-eight categories of documents. Pre-trial conferences were held during February with the not unusual result of the Government claiming that it was being over-liberal in its disclosures and the defense contending either that if was not enough or too much to be encompassed before the commencement of the trial. It was at this point that the trial court, faced with the necessity of commencing the trial at some time, made the suggestion that defense counsel could prepare as the case went along. No inference can be drawn from this remark that defense counsel approached the day of trial completely unprepared and that the trial court callously told them to prepare as they went along. They had been aware of the charges against their clients for some eight months. Their motions, the pre-trial conferences, the "minutiae" in the Government's bill of particulars, of which they now complain, all refute their present claim.

Even after the commencement of the trial (February 27, 1962) defense counsel had many opportunities for further preparation usually not afforded in the average trial. The Government's case was presented in substantial part

through Guterma whose testimony commenced on March 9, 1962. A week's adjournment, caused by a defendant's illness, occurred between March 13th and 20th. The first occasion for cross-examination by any of appellant's counsel did not arise until April 16th. Investigation into each phase of his testimony surely could have been made in this interval.

Lastly and most determinative is the fact that Dardi makes no showing on this appeal that the facts would have been other or different had he had an additional year or six months in which to prepare. Nor does he point even now to any facts which could have been developed which would have so radically changed the fact picture that, in effect, a new trial should be granted.

The Duration of the Trial

All the evils attendant to a long trial (February 27, 1962 to January 31, 1963) are stressed by appellants; the possibility of the jury being unable to remember the testimony given in the earlier stages of the trial, the jury's impatience in being deprived of the opportunity to attend to their own affairs, their expressed resentment at short court sessions, abandonment of any summer vacation plans and their restlessness over the long periods involved in court counsel colloquy.

There can be no scale by which to measure the proper length of a trial. See, e.g., *People v. Clemente*, 8 N. Y. 2d 1, 200 N. Y. S. 2d 625, 167 N. E. 2d 327, *cert. denied*, 364 U. S. 923 (1960). For the reasons specified and many other, long trials should be avoided. However, a multi-defendant stock fraud case, as involved as this one, usually necessitates delving into many financial transactions. Those who participate in such transactions do not supply the government with a simple and clear picture. The picture, even as on a jig-saw puzzle, only comes into vision by the assembling

of hundreds of curiously shaped parts, each piece seemingly having no identity until it is fitted into and made a part of the whole. Every defendant can claim and with much plausibility that his own role may have become besmirched by having been tried with others more guilty than he, and naturally every defendant feels that he is the least guilty, if guilty at all.

Two legal principles, however, must be honored. Those entrusted to make the laws have placed the crime of conspiracy on the books and it has not been repealed despite the fact that throughout the ages it has been largely responsible for multi-defendant trials and the admission of evidence otherwise inadmissible. Nor does any statute exist nor are there court decisions which declare a trial of more than one defendant at a time to be reversible error.

In any financial scheme of magnitude involving many persons and many companies it is but normal expectancy that there be many participants. If the Government honestly believes (and there is no proof here to the contrary) that many defendants have played a part in the conspiracy they may be and probably should be joined as defendants. Again a long-established legal principle contributes to this joinder, namely, that a defendant need not be a member of the conspiracy from its inception to its termination. Defendant co-conspirators in many instances need not even know their fellow conspirators or the particular part they are playing. If the indictment of the many original defendants contributed to the length of the trial, this fact does not constitute reversible error.

Colloquy

Appellants argue that they were deprived of a fair trial because of the extensive colloquy engaged in between court and counsel. They point to certain statistics, inserted in the record by the court itself, that after over eight months of trial the 19,544-page transcript contained 9,814 pages of

recorded testimony, 892 pages related to ancillary matters and 8,838 pages devoted to colloquy—practically 50 per cent testimony, 50 per cent colloquy. The trial was eventually to consume over eleven months and the transcript to extend over 26,000 pages.

By definition, colloquy is mutual discourse. In any litigation, but particularly where many defendants and many counsel are assembled, colloquy is indeed mutual and can, unless controlled, become overly extensive. The Dardi brief contains a twenty-four page analysis of the subject matter of the more extended colloquies. Each topic was related to some point, substantive or procedural, which one or more counsel believed to be of importance to his cause. The trial court was undoubtedly motivated by a desire to obtain the correct answer and to give counsel the benefit of expressing their views. However, is the trial transcript the place to have recorded the extemporaneous legal philosophies of counsel, philosophies frequently tinged by the exigencies of the moment and the character of the testimony sought to be admitted or excluded? Would it not be better to insist that trial counsel insofar as possible be prepared to justify their positions in written memoranda submitted to the court? The myriad of legal points which could be conjured up by resourceful counsel, if debated on the record in a long and complicated case such as this, would result in a legal treatise not unlike a hypothetical *Corpus Juris Tertium*. Using the statistics submitted to us, since half of the record in eight months was devoted to matters other than testimony, the jury was subjected to four months of enforced attendance at a debating contest. This is not to say that on occasion a brief statement of the grounds for objection or the reasons for the admission or exclusion of evidence may not be helpful to court and opponent but the dictation by counsel on the record of treatises tantamount to Law Review articles should be avoided.

Except for unduly protracting the trial, and we have already determined that length *per se* does not create reversible error, the colloquy itself does not disclose material of a prejudicial nature. Furthermore, the blame, if blame there be, must be shared by the court and all counsel. But this is not to say that a tighter rein by the Judge would not have resulted in a materially shorter trial. We have already said that the court has wide discretion in adopting methods which will expedite a trial and that there are occasions when it is wise for this discretion to be exercised. See *United States* v. *Agueci*, *supra*, at 841.

The Trial Court's Charge

1. Summation of Contentions

After an eleven months' trial, the trial court apparently believed that it would be of aid to the jury to summarize the facts. This summary occupied the first day of the two-day charge. Appellants attack the court's review of the parties' "contentions" as a distortion, more specifically, that they were not defendants' contentions but rather that "they were the prosecution's contentions of defense 'contentions.'" Only a careful analysis of the charge itself supplies the answer to the accusations that it was not impartial, that it was unfairly balanced, unfairly presented and unfairly emphasized or de-emphasized the positions of the defendants. To set forth any detailed refutation of these charges might well require a re-statement of the court's 450 page charge. Any such procedure would only add needlessly to the ever-expanding law reports. The conclusion from this court's analysis is that the charge was fair and that no reversible error can be attributed to the trial court's review of the facts or "contentions."

2. Legal Errors in Charge

In addition to the attack on the trial judge's summary of "contentions" in the charge, appellants assert that the

charge incorrectly stated the law in various respects. While specific sentences as excised from the overall context may have been unfortunate, we think it clear that when viewed in its entirety, the charge correctly stated the law.

Appellants claim that the trial court's instructions on the issue of appellants' guilty knowledge and criminal intent as to the substantive counts was tantamount to directing the jury to bring in a guilty verdict. They stress particularly the statement that in proving that a defendant acted knowingly and wilfully it was not necessary for the defendant to know that he was breaking "any *particular* law or any *particular* rule" (emphasis added); that the jury might consider the amount of profits made on a certain transaction and whether appellants had a pecuniary or financial interest in the outcome of the transactions.

While these statements taken separately may seem misleading, we believe that this portion of the charge, read as a whole, adequately informed the jury of the government's obligation to prove guilty knowledge. The Court said: "An act is wilful if it is done knowingly, deliberately and with an evil motive or purpose. . . . The significant fact is the particular defendant's state of mind." In its context the statement that the defendants need not have known they were breaking "any particular law" signified that they must be shown to have known their actions were illegal even if they did not know exactly which statute they violated. The Court then suggested criteria by which to evaluate the circumstantial evidence bearing on intent. Incriminating inferences, it suggested, might be drawn from documents which did not accurately depict the transactions they related to, from documents "made up, if you so find, to conceal what you regard as the actual facts in the transaction," from the use of dummy nominees and "of exchange checks to disguise the payment of money." Finally, in discussing the defendants' contention that they were protected by

their reliance on legal opinions, the Court charged that reliance on legal advice did not always constitute a complete defense; otherwise

> "regardless of the consciousness of wrongdoing on his part and perhaps on the part of his legal advisor, the advice of counsel would operate to confer immunity from punishment. Such is not the case.
>
> "However, if a man honestly and in good faith seeks advice of a lawyer as to what he may lawfully do, and if he fully and honestly lays the facts before his counsel and in good faith honestly follows that advice, relying upon it and believing it to be correct, and only intends that his acts shall be legal, he could not be convicted of a crime which involves wilful and unlawful intent even if the legal advice that he received was erroneous.
>
> "But, on the other hand, no man can wilfully and knowingly violate the law and attempt to excuse himself from the consequences by arguing that he followed the advice of counsel."

Furthermore this portion of the charge on requisite criminal intent[6] as to the substantive counts was supplemented by the statement made a few minutes earlier in the charge on the conspiracy count that "a knowing participation in a scheme having as an objective the knowing violation of the Securities Laws or the knowing violation of the Mail Fraud statute" was required.

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[6] There is some dispute whether knowledge of illegality of sale need be shown to satisfy the "wilfulness" requirement of the Securities Act if the seller knew that the stock was control stock and that it was not registered. See Loss, *Securities Regulation* 1086, 1309 and Supp. 1962 (discussing *United States* v. *Crosby*, *supra*). Since the charge was adequate on either view, we need not consider whether it gave the defendants an advantage to which they were not entitled.

The Court properly instructed the jury that the Rule 133 "merger" exemption from the registration requirements did not apply to a subsequent resale of the stock acquired in the United Dye Handridge merger. 17 C. F. R. § 230. 133; see *United States* v. *Crosby*, *supra*, at 939; *SEC* v. *Culpepper*, 270 F. 2d 241, 247-48 (2d Cir. 1959). Appellants assert that the trial court erred in refusing to charge the jury that it might consider the extent to which the application of Rule 133 was unclear in 1956. However, it is at best doubtful that appellants were entitled to such a charge, since there was no evidence that they in fact had been misled by an incorrect analysis of this exemption. Indeed, the opinion letters relied on by Berman correctly advised that the stock was freely tradeable only if the seller were not a control person. In any event, the trial court did remind the jury of appellants' contention that "they acted on the advice of lawyers, that they were told that Rule 133 exempts the stock, that they didn't know that the stock had to be registered."

We have carefully considered the other contentions pertaining to legal errors in the charge and have found them to be without merit.

General Unfairness and Admission of Prejudicial Evidence

Dardi asserts that the trial court's rulings evidenced an conscious discrimination against defendants, the cumulative effect of which requires reversal; in the alternative, he points to various rulings which by themselves are said to require reversal. The innuendo that the trial court did not carry out its judicial obligations is completely unfounded.

1. Shawano and Bon Ami

Much of Dardi's criticism of the integrity of the trial can be attributed only to the nature of the conspiracy itself. For example, Dardi contends that admission of evidence concerning Bon Ami and Shawano Development Corporation resulted in prejudicial error requiring reversal. On direct examination, Guterma was allowed to tell of a prior conviction under the Securities laws involving both Bon Ami and Shawano stock. See *United States* v. *Aronson*, 319 F. 2d 48, 51 (2d Cir.), *cert. denied*, 32 U. S. L. Week 3187 (U. S. Nov. 18, 1963). Thereafter, transactions involving each corporation were put before the jury. Thus, Guterma testified that $150,000 of the $450,000 which Garfield and Pasternak transferred to United Dye in exchange for the release of the "pipeline" guarantee was channeled through Kent Window Corporation, a subsidiary of Shawano. Bon Ami was scrutinized more thoroughly. The liquid assets of Bon Ami were thus shown to have been used to satisfy the $519,000 Murchison obligation and to enable United Dye to repay the short-term debt incurred when Bon Ami was acquired. In each instance the transaction was relevant to show the close relationship between Guterma, Garfield and Pasternak and the mechanics by which the major purpose of the conspiracy was effected. And, Dardi's cooperation with and proximity to the "executive" group during these dealings was "highly relevant to the issue of criminal intent and knowing complicity in the fraud and conspiracy." *United States* v. *Crosby*, *supra*, at 946.

2. The Deputy Marshal Incident

Appellants urge that the trial court erred in denying a mistrial when a Deputy United States Marshal, assigned to escort Dardi during court appearances, engaged in a brief conversation with a juror. The trial court carefully investigated the incident, determined that the juror had not

been influenced and gave cautionary instructions. Under the circumstances, the court's denial of the motion for mistrial was not an abuse of discretion.

3. The Mayers Letter and Stock Purchasers' Testimony

Appellants insist that there was error in allowing the jury to examine the "Mayers" letter, portions of which they characterize as anti-Semitic and vulgar. Since the offensive language did not refer to any of the appellants, it is difficult to see how prejudice resulted from this incident. Similarly, there is no merit in the contention that appellants were prejudiced by the testimony of the unfortunate purchasers of United Dye stock. Such testimony was relevant to numerous counts of the indictment.

4. Pleas of Guilty During the Trial

At the commencement of the trial, there were twelve individual defendants. After three weeks of trial, three pleaded guilty, including the defendant Garfield who had been closely associated with Gutterma in the financial schemes under attack. Some three months later another defendant, Braun, announced his intention to enter a guilty plea and subsequently became a Government witness. In July 1962 Pasternak, also prominently involved with Gutterma, pleaded guilty. Other guilty pleas were entered in July and September. Although taken in the jury's absence, the jury could not have been unaware of these pleas. Appellants argue that under these circumstances a fair trial was impossible and that "The presumption of innocence could not have survived the parade of guilty pleas and the recitations." Dardi recognizes this court's decisions in *United States v. Crosby, supra; United States v. Falcone*, 109 F. 2d 579 (2d Cir.), *aff'd*, 311 U. S. 205 (1940); *United States v. Rollnick*, 91 F. 2d 911 (2d Cir.

1937), but claims that the many guilty pleas from defendants tied in to the same conspiracy seriously prejudiced the remaining defendants.

Of course, in any multi-defendant trial, there is a real danger that the admission of guilt by one defendant, particularly in a conspiracy case or one in which the defendants have acted jointly, will react unfavorably against other defendants. However, no rule of law has yet been promulgated which forbids a defendant from so pleading during trial. This court as have courts of appeals in other circuits, has faced this problem and has held in conformity with "the federal courts [which] have uniformly held it not error, if proper cautionary instructions are given, for the jury to be informed during trial that one or more defendants have pleaded guilty, or even for the jury to be present when the pleas are entered." *United States* v. *Crosby*, *supra* at 948; see also *United States* v. *Aronson*, *supra*; *United States* v. *Murray*, 297 F. 2d 812 (2d Cir.), *cert. denied*, 369 U. S. 828 (1962); *United States* v. *Freeman*, 302 F. 2d 347 (2d Cir. 1962). The instructions given by the trial court after each plea, together with its comments on this subject in the charge, met the law's protective requirements.

IV.

Specific Errors

Restrictions on Lebrich's Cross-Examination

Dardi argues that the restrictions imposed upon the cross-examination of witness Lebrich was a denial of due process of law, and in the alternative, an abuse of discretion under the federal rule of the scope of cross-examination. Lebrich was an officer and director of United Dye and was Guterma's legal adviser. He was named as a co-conspirator, but was not a defendant. On its direct case,

the Government called Lehrich to give testimony concerning what the parties have characterized as the "Bender" affair. Because of the limited scope of the direct examination, the trial court refused to permit defense counsel to cross-examine on the events of 1955 and 1956.

The trial court was justified in the exercise of its discretion in limiting cross-examination to the scope of the direct. *United States* v. *Minuse*, 142 F. 2d 388, 389 (2d Cir.), *cert. denied*, 323 U. S. 716 (1944). Moreover, during Lehrich's cross-examination (cross-examination by Dardi's counsel covers some 250 pages of transcript), the court gave defense counsel "widest latitude to impeach Lehrich on such matters as bias, interest, hostility, special relationship to the government, and motivation to falsify, . . ." Cf. *United States* v. *Bentvena*, *supra*, at 940-41. In any event, the trial court advised counsel that if Lehrich was called as part of the defense case, he could be examined on the events of 1955 and 1956 as a hostile witness. Having failed to avail himself of this opportunity, Dardi cannot now complain.

The "Bender" Affair

To show Dardi's "consciousness of guilt," the Government adduced testimony involving an attempt to quash a SEC investigation of United Dye through the intercession of former Senator George Bender, then Special Assistant to the Secretary of the Interior. Dardi argues that there was a failure of proof in regard to the "Bender" episode which resulted in substantial prejudice.

The "Bender" affair was alluded to first in the Government's opening and was developed in more detail during Guterma's direct examination. While Guterma's testimony on this matter was restricted to Dardi, the only participant remaining in the case, he was completely exonerated by Guterma's account, and the jury was thoroughly instructed

to that effect. Thereafter, Lehrich testified in substance that he had told Dardi of a conversation he had had with Garfield in which Garfield had spoken of a commitment for $100,000 which he (Garfield) had with Bender; that Guterma was obligated for $30,000 of the commitment and Dardi for $20,000; that Garfield would like them to meet their obligations; that Dardi said that he had made such a commitment but was out of funds at the moment but that he would talk to Garfield about it. Lehrich then told of a previous conversation in which Garfield had said that Bender might be helpful in connection with a pending SEC investigation; that Garfield said that he told Dardi, Guterma and Eveleigh of his projected trip to Washington to see Bender and that he had seen Bender.

There was no failure of proof. Lehrich's testimony, if believed, might well have been sufficient to have implicated Dardi. And in view of the trial court's adequate and specific direction to the jury that the Bender episode was being offered only as to Dardi, the conclusory claims of prejudice by the other appellants are without merit.

The Prosecutor's Comments on Summation as to Cumulative Testimony

Error is asserted in the court's refusal to grant Dardi's motion for a mistrial because of the prosecutor's statement in summation that Lehrich and Eveleigh if called would have testified cumulatively to Guterma. Apparently the prosecutor felt piqued to make this comment because of references in the summation of defense counsel to the failure of the prosecution to call them as witnesses. Counsel for the prosecution and the defense definitely should not put forward their own views as to the possible testimony of witnesses not called or tell the jury their own reasons for not calling them. However, here the jury had adequate affirmative testimony to support its verdicts and the prose-

cutor's comments under the circumstances do not constitute reversible error.

Berman's Inspection of Prior Testimony

Upon Berman's cross-examination, the Government read various questions and answers from Berman's prior testimony to the SEC and the Stock Fraud Unit of the office of the Attorney General of New York. While counsel was permitted to examine each question and answer, the court did not allow counsel to read the transcripts as a whole or those portions surrounding the questions and answers alluded to. At the completion of cross-examination, the court took it upon itself to read both transcripts "for the purpose of finding out whether there is any material or relevant qualifying or explanatory context of the questions and answers . . . used."

In *United States* v. *Stone*, 282 F. 2d 547, 552 (2d Cir.), *cert. denied*, 364 U. S. 928 (1960), this Court affirmed the proposition that "when the prosecution uses testimony of a defendant before the grand jury, the defendant must be allowed to inspect it." See *United States* v. *Cotter*, 60 F. 2d 689 (2 Cir.), *cert. denied*, 287 U. S. 666 (1932). In *Stone*, where the Court did not examine the transcript, this Court on appeal reversed the conviction on one count since it was not certain that the grand jury transcript which this Court had examined would not have been "far more effective than what the trial jury may well have regarded as an invented and self-serving explanation of the inconsistency." In *Cotter*, however, the trial court did read the transcript; and, because appellants there "chose to rest upon the bare denial of their right" and had shown no prejudice, the convictions were affirmed.

Here, as in *Cotter*, there is no showing of prejudice. Berman eventually did obtain a copy of his SEC testimony, although from a source other than the trial court or prose-

cutor, in such time that he might have used it had he so desired. As to the Attorney General's transcript, it appears from the record that Berman abandoned his requests to examine it personally. He was not entitled to the full transcript until the Government used it on cross-examination. See *United States* v. *Murray*, *supra*, at 821. When the request was first timely made, after cross-examination, the trial court suggested that Berman raise the matter again. Although Berman thereafter pressed for the SEC material, no further demand was made for the Attorney General's transcript. Berman expressed his appreciation to the trial court for undertaking to read the transcript, but did not inquire later as to what the trial court's reading had disclosed. Under these circumstances, it is clear that Berman seeks to take advantage of circumstances which arose due to his own inaction. His claim does not merit reversal of his conviction.

Assignment of Counsel for Rosenthal

Rosenthal argues that the trial court's failure to adjourn the trial because of his counsel's illness, and its subsequent assignment of a co-defendant's counsel requires reversal. Examination of the events surrounding Rosenthal's original counsel's disability, his unsuccessful efforts to secure another counsel willing to proceed without an inordinate continuance and the arrangements finally made lead to the conclusion that the trial court's treatment of the matter was entirely reasonable under the circumstances, and that Rosenthal suffered no prejudice. Rosenthal had a month's notice that his lawyer's health was questionable. His original counsel was available for consultation with his replacement. His defense had not been unduly complicated. The trial court, therefore, properly refused the continuance of "at least a month and a half to two months" requested by the lawyer Rosenthal selected. Rosenthal was unable to make satisfactory financial arrange-

ments with other counsel; consequently, the court appointed the counsel of another defendant, Cornelius De Vroedt, Inc., who had also represented the individual defendant DeVroedt prior to his severance due to illness. Rosenthal, Cornelius DeVroedt and the DeVroedt Corporation were charged with "substantially the same acts," and the Court specifically found that the assignment would not give rise to a conflict of interests; but indicated that if a conflict were to arise, the appropriate precautions would be taken.

While the right to counsel is absolute, its exercise must be "subject to the necessities of sound judicial administration." *United States* v. *Arlen*, 252 F. 2d 491, 494 (2d Cir. 1958); and where there appears to be no conflict, the court may, in its discretion, assign to a defendant the attorney of a co-defendant. See, *e.g.*, *Banziger* v. *United States*, 161 F. 2d 299, 301 (9th Cir.), *cert. denied*, 332 U. S. 769 (1947). Such an assignment is not, in itself, a denial of effective assistance of counsel. Since *Glasser* v. *United States*, 315 U. S. 60 (1942), it has been clear that some conflict of interest must be shown before an appellant can successfully claim that representation by an attorney also engaged by another defendant deprived him of his right to counsel. See *United States* v. *Bentvena*, *supra* at 937 and cases there cited. During the Government's direct examination of Barkley, there arose the possibility that a conflict of interest might occur during cross-examination. At that point Cornelius DeVroedt, Inc. entered a plea of *nolo contendere* and was severed, thus removing any possible conflict.

Rosenthal makes the further argument that the trial court improperly denied his request to put a series of "exculpatory" questions to a former salesman who had invoked the Fifth Amendment. This argument proceeds on an erroneous notion of evidence that may be submitted for the

jury's consideration. An attempt to influence the jurors in the manner suggested was correctly rejected by the trial court.

Impeachment of Witness McCollom

McCollom was a defense witness called to rebut Brann's testimony. He testified that Brann's reputation in Geneva, Switzerland, for truth and veracity was "just as poor as it could possibly be." On cross-examination, the prosecution asked McCollom whether or not there was a warrant of arrest outstanding against him in Switzerland for embezzlement of $50,000. Apparently, the Government sought to show that McCollom was motivated to lie about Brann because Brann had been responsible for bringing the embezzlement charges. However, McCollom denied that an arrest warrant existed and the Government was prevented from pursuing the inquiry. Dardi relies on *Michelson v. United States*, 335 U. S. 469 (1947), in urging that the Government's inquiry requires reversal. That case, however, concerned the use of evidence of a prior conviction after the defendant had placed his character in issue. Here, the question was aimed at impeaching a witness' credibility by showing his hostility and bias. While an arrest alone is not normally admissible to impair the credibility of a witness, the fact that it might have embittered him so as to motivate him to testify as he has may be relevant. In any event, the incident complained of, when viewed in context, was not so prejudicial as to require reversal.

Timm's Appearance Before the Grand Jury and During the Trial

Reversible error is attributed to the prosecutor's acts in calling Alexander Timm, Dardi's former personal secretary and an officer and director of United Dyes, before the Grand Jury. The reason advanced by the prosecutor

for this action was that Timm's testimony was relevant to a possible conspiracy to obstruct justice. Dardi in turn claims that the prosecutor was only using this reason as a subterfuge to gather valuable evidence and to put pressure on Timm so as to obtain information and leads for use on the trial.

The merits of these conflicting contentions were carefully considered by the trial court in a seven-page opinion dictated into the record, denying a defense motion for a mistrial and the suppression of evidence. The trial court read Timm's Grand Jury testimony, properly recognized the principle of law that "It is improper to utilize a Grand Jury for the sole or dominating purpose of preparing an already pending indictment for trial" and came to the conclusion that under the particular facts before it (no useful purpose will be served by outlining the Government's futile subpoena efforts) "the Grand Jury's inquiry into a possible conspiracy to obstruct justice was conceived and carried out in good faith and in a manner that did not prejudice the complaining defendant," and that Timm's Grand Jury subpoena did not constitute "the use of a Grand Jury as a subterfuge to elicit testimony for use at this trial." Under all the circumstances, this conclusion must be sustained.

The jury had full opportunity to hear the explanations advanced by capable counsel during most extensive summations in complete exculpation for appellants' every act. The four days required by the jury to reach their verdicts scarcely bespeak a snap judgment. In final analysis, the resolution of the facts and the inferences to be drawn therefrom were for jury decision. After consideration of all the many assertions of error, none of the points, individually or collectively, demonstrate that the defendants were deprived of a fair trial.

Judgments affirmed.

Statutes Involved

UNITED STATES CONSTITUTION

Art. 1, § 9, Cl. 3:

Bill of attainder and ex post facto laws. No Bill of Attainder or ex post facto Law shall be passed.

Amendment V:

No person shall be * * * compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law * * *.

Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment VIII:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Title 15, United States Code

77e Prohibitions relating to interstate commerce and the mails.

(a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; * * *

77x Penalties.

Any person who wilfully violates any of the provisions of this subchapter, or the rules and regulations

promulgated by the Commission under authority thereof, or any person who willfully, in a registration statement filed under this subchapter, makes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined not more than $5,000 or imprisoned not more than five years.

Title 18, United States Code

2 Principals.

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

371 Conspiracy to Committ Offense or to Defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Federal Rules of Criminal Procedure

Rule 8. Joinder of Offenses and Defendants

(a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the

same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Rule 14. Relief from Prejudicial Joinder

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventeenth day of March one thousand nine hundred and sixty-four.

Present:

HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. IRVING R. KAUFMAN, *Circuit Judges.*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

SAMUEL S. GARFIELD, et al.,
Defendants,

VIRGIL D. DARDI, CHARLES ROSENTHAL, ROBERT B. GRAVIS, CHARLES M. BERMAN,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO
Clerk

A true copy,
A. DANIEL FUSARO,
Clerk

[SEAL]

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 164

VIRGIL D. DARDI, PETITIONER

v.

UNITED STATES OF AMERICA

No. 165

CHARLES ROSENTHAL, PETITIONER

v.

UNITED STATES OF AMERICA

No. 166

CHARLES BERMAN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 158 Misc.

ROBERT B. GRAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND ON MOTION OF PETITIONER GRAVIS FOR LEAVE TO PROCEED IN FORMA PAUPERIS

BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE GRANTING OF THE PETITIONS FOR WRITS OF CERTIORARI

OPINION BELOW

The opinion of the court of appeals (R. 1–37)[1] is reported at 330 F. 2d 316.

JURISDICTION

The judgment of the court of appeals was entered on March 17, 1964 (R. 38). Petitions for rehearing by Dardi, Rosenthal and Berman (No. 164–166) were denied on April 10, 1964 (R. 96, 98, 100), and their time to file petitions for writs of certiorari was extended to June 19, 1964. Petitions for rehearing and rehearing en banc on behalf of Gravis (No. 158 Misc.) were denied on April 20, 1964 (R. 115, 119–121), and his time to file a petition for a writ of certiorari was extended to and including June 19, 1964. On June 9, 1964, petitioners Dardi, Rosenthal and Berman filed separate petitions for writs of certiorari. On June 19, 1964, petitioner Gravis filed a petition for a writ of certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the length of the trial, due in large part to activities by defense counsel, prejudiced the petitioners (raised by all petitioners).

2. Whether petitioner Dardi (No. 164) was accorded adequate pretrial discovery.

3. Whether petitioners Dardi and Rosenthal (Nos. 164 and 165) were unduly curtailed in their right of cross-examination.

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[1] The proceedings in the court of appeals are referred to as "R.". The original transcript and the district court proceedings are consecutively numbered and will be referred to as "Tr.".

4. Whether the conduct of government counsel in cross-examination of a defense witness and summation (No. 164) was proper.

5. Whether petitioner Berman (No. 166) was prejudiced by failure to give him a copy of the transcript of his own testimony.

6. Whether petitioner Rosential (No. 165) was prejudiced when his trial attorney was incapacitated and the court assigned counsel who had previously represented a similarly situated defendant.

7. Whether petitioners Berman and Gravis (No. 166 and No. 158 Misc.) were prejudiced by the charge to the jury on willfulness and intent and whether the proof of willfulness as to Berman was sufficient.

8. Whether the calling of a witness before a grand jury investigating an obstruction of justice amounted to an abuse of process (No. 164) where the trial judge read the grand jury transcript and found that the grand jury had not been used to prepare for this trial.

STATUTES AND REGULATIONS INVOLVED

Pertinent parts of Sections 2, 4 and 5 of the Securities Act of 1933 (15 U.S.C. 77b(11); 15 U.S.C. 77d (1); 15 U.S.C. 77e(a)) and SEC Rule 133 (17 C.F.R. 230.133(a)) are found in the Appendix.

STATEMENT

Petitioners were all convicted in a jury trial in the United States District Court for the Southern District of New York of conspiracy to violate provisions of the Securities Act, the Securities Exchange Act and the mail fraud statute by selling stock belonging to a control group without registration, utilizing

fraudulent practices to sell stock, and manipulating the market (Tr. 27154–27167). Counts 2, 4 and 5, on which Dardi (No. 164) was convicted, charged the illegal manipulation of the market through stabilization transactions on the New York Stock Exchange (Tr. 27168–27171). The remaining counts charged the illegal sale of unregistered stock (Tr. 27171–27175). Petitioner Gravis (No. 158 Misc.) was convicted on counts 1 and 29; Berman (No. 166) on counts 1, 11, 12, 13, 22 and 23; Dardi (No. 164) on counts 1, 2, 4, and 5; and Rosenthal (No. 165) on counts 1, 27 and 28. The jury acquitted Gravis on count 16, Rosenthal on count 15, and Berman on counts 14, 24, 25 and 26 (Tr. 26680–26681). The total sentences were as follows: Dardi, seven years' imprisonment and a fine of $40,000; Berman, six years' imprisonment and a fine of $35,000; Gravis, five years' imprisonment and a fine of $15,000; Rosenthal, four years' imprisonment and a fine of $20,000 (Tr. 28877–28881). The court of appeals unanimously affirmed the convictions (R. 38).

Petitioner Dardi was President and a Director of United Dye, a corporation with its stock listed on the New York Stock Exchange. Petitioners Gravis, Rosenthal and Berman were stock brokers who handled the sale of United Dye stock in the over-the-counter market. As background for the questions presented, the pertinent facts may be summarized as follows:

A. The scheme

1. Control of United Dye

In June 1955, Dardi and co-conspirator Guterma arranged to purchase 38,500 shares of United Dye

(Tr. 689–696, 798–799, 718–720). These shares were divided among other conspirators; all told, they represented control of United Dye (Tr. 693–694, 749–750, 728–730). Guterma became Chairman of the Board and Dardi President (Tr. 754–755).

2. Merger arrangements

The Franklin County Coal Corporation had coal lands which had not been mined for years (Tr. 8720, 9039) and an oil pipeline whose income had been declining (Tr. 8730–8732, 8972, 8950, 22180–22182). The Franklin stock was purchased by conspirators Garfield and Pasternak for a promissory note in the amount of $510,000, with the shares being pledged as security for payment of the note (which later was assumed by United Dye) (Tr. 8784–8785, 1527). The conspirators then transferred their interest in Franklin to a corporate shell, Handridge Oil Corporation, whose stock was held in the names of nominees to disguise its actual ownership by "control persons," which would have required registration under the Securities Act of 1933 (Tr. 779, 781–783, 817–822, 830, 835). Dardi and Guterma also arranged for members of the Board of Directors of United Dye to obtain an additional 75,000 shares of United Dye stock which were to be sold without compliance with the registration requirements relating to sales by "control persons." They accomplished this by making 75,000 shares of Handridge available to nominees of the Board at $10 per share, with the knowledge that Handridge stock would automatically be con-

verted to United Dye when a merger occurred (Tr. 881–884, 901–906, 5575–5580, 1350–1351).

On December 5, 1955, United Dye and Handridge executed a merger agreement to take effect May 1, 1956, under which 575,000 shares of United Dye would be given in exchange for 575,000 shares of Handridge stock and $750,000 cash (obtained by the sale of the 75,000 shares of Handridge, see *supra*) (Tr. 787, 789, 802, 808, 810, 812, 813, 893, 901–905). Meanwhile, Dardi and others sold the bulk of their original United Dye shares in order to reduce the price at the time of the merger and thereby lessen the scrutiny to which the transaction would be subjected (Tr. 923–929, 1187).

Dardi and others arranged to have the 575,000 shares listed on the stock exchange by exaggerated claims as to the value and potential of the Franklin properties and by nondisclosure of the true ownership of Handridge and the pledged Franklin stock (Tr. 7325, 8050, 8097–8104). Dardi and Guterma also arranged to have United Dye obtain control of Bon Ami, whose treasury ultimately provided the cash funds not only for the purchase of its own control stock, but also for the redemption of the pledged Franklin stock (Tr. 1343–1358, 1513–1514).

As part of the merger, conspirators Garfield and Pasternak had pledged 85,000 shares of United Dye to guarantee that Franklin would produce $1,200,000 in profit in 1956 and 1957. Two months after the merger, this was waived in return for a payment of $800,000, part of which came from United Dye itself (Tr. 1546–1582). The shares were then worth $1,

200,000 and the guarantee could not have been fulfilled (see *supra*).

3. Boiler-room sales of unregistered control stock

After the merger, it was agreed to sell the United Dye shares that had been obtained through the merger on the over-the-counter market, while watching the exchange market for any possible reaction (Tr. 1587–1601, 1620, 16725). When it was discovered that one of the conspirators had sold some of the stock on the Exchange, Dardi and Guterma convinced him to stop, but only after it was agreed to set up an over-the-counter boiler-room operation for selling all the shares (Tr. 1597–1601). Thereafter, over 500,000 shares of United Dye stock were sold through over-the-counter boiler-rooms, in part by petitioners Rosenthal, Gravis and Berman (Tr. 1620, 1629, 1632, 17627–17632, 17996–17997, 23660, 23668).

In order to obtain a successful boiler-room distribution, the conspirators used false press releases and "tout" sheets prepared by Hughes and approved by Dardi and Guterma (Tr. 11794–11796, 11802–11803, 6829–6832), a false "tout" sheet called "Duval's Consensus" (Tr. 11730, 11794–11797), and a false brochure distributed to the brokers (Tr. 11862, 1639–1640, 11794–11796, 8602–8605).

4. Market manipulation.

Meanwhile, in order to maintain the market price, Hughes, Guterma's aide, was instructed to purchase any United Dye stock which was offered on the Exchange, whenever there was no willing purchaser (Tr. 1591–1593, 1673, 11829–11837). Dardi arranged to have Hughes use his brokerage account and the names

of others (Tr. 11845–11849, 12904–12908). Since purchases through a foreign bank could be made at approximately 30 per cent margin (Tr. 1668), Dardi suggested that defendant Herman Brann, who owned a bank in Tangier, Morocco, could be of assistance (Tr. 1664–1665). After various meetings (Tr. 12865, 12869–12882, 1667–1671), an agreement was reached with Guterma's lawyer, Louis Levin (Tr. 12886–12887), to transmit the funds through a Liechtenstein bank account under control of Levin (Tr. 12888–12910). Thereafter, Brann received $210,000 for purchases of United Dye stock (Tr. 12931-12937) to be resold in Europe, Africa and the Near East (Tr. 12886, 12920). Part of the sales price was returned to Dardi and Guterma (Tr. 12983–12984, 13007, 13229, 1673). Petitioner Rosenthal also assisted in stabilizing the market (see Tr. 16689–16780). These manipulations maintained the Exchange price during the period of boiler-room sales.

B. Participation by petitioners

1. Dardi

The evidence against petitioner Dardi, showed that he had been told prior to the merger that the stock would be held by nominees and, shortly after the merger, would be sold, but not on the stock exchange (Tr. 808–817, 880–882, 12881, 1594–1597). Furthermore, his personal assistant maintained a check on the exchange sales immediately after the merger (Tr. 6476, 1589–1597, 1744). Finally, Dardi reviewed and approved the false material for use in brochures to aid the over-the-counter sales (Tr. 1639–1640, 11794–

11796) and was advised by brokers of the progress and sales (Tr. 9382, 11934–11936, 16783).

2. Berman

The evidence showed that petitioner Berman made arrangements personally with Guterma to sell United Dye in the "over-the-counter" market, at a meeting at which Berman did not "want anybody else present". Berman was told that "any amount" he could sell would be available and that the stock was to be sold at the last closing price on the Exchange each day. The special "terms of compensation" were that brokers would get 15 per cent commission by "check" (rather than the New York Stock Exchange commission of approximately one-tenth of 1 per cent plus $39 for sales in lots of over $5,000 (Tr. 10089–10090)), and an unrecorded $1 "in cash" per share (Tr. 1631–1638, 16766–16769). When Berman called Guterma about a drop in price on the Exchange, Guterma told him not to be disturbed, and that efforts were being made regarding the "market stabilization" (Tr. 1636–1636A). Berman knew that stock sold for a "control group" had to be registered (Tr. 23845–23846).

3. Gravis

The evidence against Gravis, who was owner of the firm, R. B. Gravis, Inc. (Tr. 11924, 15655, 15664), showed that he told Hughes (a Guterma aide) that he was interested in selling United Dye. Hughes introduced him to Guterma (Tr. 11923–11924). Gravis was told that over 500,000 shares were available but could be sold only over-the-counter. He was assured that this would not affect the price which

would be maintained on the Exchange. Guterma also told Gravis of the proposed compensation, *i.e.*, 15 per cent by check and $1 in cash (Tr. 1628–1638, 11923–11928). When the SEC made inquiry regarding the sale of United Dye, Gravis said that his clients were not persons in control and that "there was no connection with Mr. Guterma" (Tr. 15653–15677).

4. Rosenthal

The evidence as to petitioner Rosenthal indicated that he and defendant Barkley, who pleaded guilty, each had a fifty per cent interest in I. F. Stillman & Company. The president of that company was used as a front because Rosenthal had been enjoined from engaging in the brokerage business and Barkley had been indicted for securities fraud (Tr. 16757–16759, 16688, 16924). After Rosenthal had executed an order to buy United Dye shares on the Exchange, in order to manipulate the market price (see *supra*), a meeting was arranged with Guterma and others at which Rosenthal agreed to sell Guterma's shares for a commission of 15 per cent plus a five per cent unrecorded cash payment (Tr. 16690-16705, 11866–11868). At another meeting, Guterma explicitly informed Rosenthal that the group, which controlled approximately 550,000 shares, wanted the stock sold on the over-the-counter market on the same conditions (Tr. 1620–1621, 16724). When Barkley expressed concern that the sales were coming from a controlled group, Rosenthal suggested that they obtain letters showing that the sales were made for individuals who "were not members of the control group" (Tr. 16724). Rosen-

thal also assisted in purchasing United Dye shares on the Exchange in order to rig the market price (Tr. 16697–16703, 16749, 16761–16764, 16775–16776, 16722–16725).

C. Concluding events

In April 1957, Guterma resigned as Chairman of the Board and disposed of his remaining control shares (Tr. 1742–1746). In the fall of 1957, conspirator Garfield informed Guterma that arrangements had been made for former Senator George Bender to intercede with the SEC and to urge that it refrain from recommending criminal charges (Tr. 1788–1789, 18476). United Dye's attorney, Lehrich, who was sent to Bender, dictated the memorandum that formed the basis of Bender's report (Tr. 1791–1795, 18193–18195, 18480–18481, 18781, 18924–18925). Dardi was informed of the trip (Tr. 18194–18195). Later, Dardi told Lehrich that he had made a commitment to pay $20,000 of the $100,000 given to Bender, but that he was then short of funds (Tr. 18189–18191). In early 1958, records of United Dye were destroyed by Dardi, Brann and Guterma (Tr. 13537–13542).

ARGUMENT

While petitioners do not question that a scheme to defraud was proved, each contends that his participation was minor or unknowing. As shown in the Statement, however, the contention is without basis; for each petitioner played an important and essential role in the conspiracy.

The scheme embraced the following steps: (a) gaining control of United Dye, a corporation listed

on the New York Stock Exchange; (b) obtaining a large number of shares of United Dye stock through a merger; and (c) selling those shares (which should have been registered under the Securities Act of 1933) to the public on the "over-the-counter" market by means of high pressure "boiler-room" tactics, while artifically stabilizing the market price on the Exchange. Thus, for the conspiracy to succeed, it was essential that the Exchange market be stabilized while the control shares were dumped (as charged in the substantive counts against Dardi), and at the same time that the huge volume of unregistered control shares be sold outside of the normal channels of the Exchange, in the "over-the-counter" market (as charged in the substantive counts against the brokers—Berman, Rosenthal and Gravis). That the brokers knew of the illegality was an inevitable inference from the proof of their personal contact with Guterma, the huge volume of stock available, and the special commission arrangements. It is against this background of a strong, although complex, government case that the various issues raised by petitioners should be viewed.[2]

1. Length of the trial

All petitioners contend that they were prejudiced by the lengthy trial (No. 164, Pet. 41–52; No. 165, Pet. 21–28, 34–39;[3] No. 166, Pet. 9–15; and No. 158 Misc.,

[2] The trial judge described this case as proved to the "hilt" (Tr. 26712).

[3] Petitioner Rosenthal claims that the government stated he could be tried in four days (Pet. 21, 23, 34). This is not supported by the record; no other petitioner so claims; and the gov-

Pet. 13–23). This matter was fully and carefully considered by the court below, which found that petitioners had not been deprived of a fair trial. There is no occasion for further review.

In view of the enormous complexity of the scheme charged in the indictment, involving as it did the acquisitions and merger of corporations and the elaborate manipulations of stock, it was inevitable that the trial would be a lengthy one. While eleven minor defendants (all salesmen) were severed on motion of the government, it was necessary as to the others (including the three broker petitioners)[4] to prove the entire scheme if the role of each defendant was to be made clear to the jury. As it happened, eleven defendants pleaded guilty, during the trial, leaving only the guilt of petitioners and one corporate defendant to be decided by the jury. But the necessity of proving the nature of the conspiracy remained, both as to Dardi, who was at the center, and as to the brokers, whose complicity depended upon proof justifying the inference that they knew they were dealing with stock owned by "control" personnel.

Moreover, to the extent that the trial may have been unduly prolonged, petitioners, themselves, bear a substantial share of the responsibility. Indeed, in complaining of the length of the trial, they are placed in the anomalous position of arguing that the judge should have curtailed colloquy, largely of their own

ernment specifically denied making such statement in the reply brief below.

[4] Four defendants had pleaded guilty before trial and two did not appear.

counsel (cf. *infra* as to allegations of undue restriction on cross-examination). Furthermore, the court noted on the record the inordinate amount of time that defense counsel consumed between questions and rummaging around for papers (Tr. 12034–12035, 26701). And while the proper extent of cross-examination is admittedly a debatable subject, it is noteworthy that the time used by the defense in cross-examining the government's witnesses far exceeded the time used for direct examination.[5]

Despite the length of the trial, however, the record shows that the jury gave the case full consideration. Their deliberations began on Thursday, January 31, 1963 (Tr. 26550), continued through the weekend, and resulted in a verdict at 12:25 p.m. Monday (Tr. 26679). During this period they requested numerous pertinent exhibits. While Dardi was convicted on all

[5] (*E.g.*, government's direct examination of Guterma used 429½ pages, while cross-examination consumed 1,130 pages; direct examination of Paulson filled 54 pages, cross-examination 226½ pages; direct examination of Lehrich required only 6 pages, as compared to 252 pages for cross-examination.)

In one instance, moreover, the court was obliged to record a deliberate delay of a full day by defense counsel (Tr. 17033, 17038–17049, 17062). On another occasion, defense counsel requested the government to produce a document to refresh a witness's recollection of the names of subscribers to 75,000 shares of United Dye (Tr. 4182). After a colloquy as to the bona fides of the request (Tr. 4196-4197, 10800–10802) the document was produced, but it was never used (Tr. 4201–4208). It later developed that counsel had the very same information in a letter from the escrow agent (Tr. 4239–4241). Counsel twice opposed extending the hours of trial (Tr. 6162–6171, 7376, 7393), although the jury itself shortly afterward requested and obtained an extension of the trial hours (Tr. 7398–7400; see also Tr. 19295–19301).

submitted counts, the other petitioners were all acquitted on at least one count (Tr. 26680–26681). These facts indicate that the jury conscientiously considered all claims under the court's instructions and thus that the length of the trial did not deprive petitioners of a fair trial.

The length of a trial is not a reliable measure of its fairness. Here the prolongation of the trial was due, at least in part, to the trial court's painstaking effort to be fair to all defendants. While the length of the trial may have been unfortunate, a review of the record fails to show either that petitioners took affirmative steps at the trial level to alleviate the situation or that any petitioner was actually prejudiced.

2. Pre-trial discovery

Petitioner Dardi's complaint that he was denied proper pre-trial discovery (No. 164, Pet. 31–41; see also No. 158 Misc., Pet. 15–17) is wholly unwarranted. The fact is that he had considerable pre-trial discovery but chose not to avail himself of the opportunity.

The indictment was filed on July 14, 1961. Since there had been previous indictments counsel were not altogether unaware of the charges or materials (see Tr. 29166–29172). He was supplied with an extensive bill of particulars (Tr. 28371–28430, Document No. 135).

Dardi's discovery motions were in two parts. One listed 55 items (see Tr. 29175–29176), some of which were withdrawn during argument (Tr. 29177). Those documents which had been obtained by the SEC were available for inspection on request at the SEC office

in New York (Tr. 29216–29217, 29347–29349, 29211–29212). (1) Of the 55 requested items, five which referred to overt acts involving Dardi were withdrawn during argument (Tr. 29177) (Nos. 1, 4, 5, 13, and 14). (2) The remaining items through No. 29 are mostly other defendants' letters, checks or memoranda referred to in the overt act charges of the indictment to show that others were in the conspiracy (Tr. 27577–27580). The government had returned most of the originals to the companies or individuals (Tr. 28278) and had originally obtained only copies of many items (Tr. 29221–29222). There was no showing that these were material to his defense or that they were unavailable elsewhere. (3) Dardi was not even named as a defendant in counts six through thirty (Tr. 27604–27608, 29174), and thus items 30 through 54, composed of fraudulent mailings and confirmations by others mentioned in those counts, were not discoverable by Dardi. In any event, the government voluntarily supplied all confirmations (items 41 through 54) by attaching them to the bill of particulars (see Tr. 28379–28390); it also attached to the bill of particulars some brochures requested in the first 29 items (Tr. 29176). (4) Item 55 was a request for any statements made by Dardi, or other defendants and co-conspirators, to the government, the SEC, or other agency. Any testimony which Dardi or his co-defendants had given before the SEC could be inspected at the New York office (Tr. 29352). Statements of others were not producible under 18 U.S.C. 3500, unless the maker of the statement took the witness stand in the government case. In short, none of these 55

items was necessary for trial preparation by this petitioner.

The trial judge stated, during argument on the motions, that the purpose of Rule 17(c), F.R. Crim. P., was to prevent delays in trial and that the government knew what material it was going to use (Tr. 29219–29220). The government suggested that by the time of a pre-trial conference it would have all that material available, and if all counsel would sit down and examine it, they could stipulate to its authenticity—not relevance or materiality—and thus save many witnesses (Tr. 29220–29221).

The second motion was a supplemental request by Dardi for (1) all correspondence among the defendants and co-conspirators during 1955, 1956 and 1957 and (2) all recordings of telephone conversations (Tr. 29178, 28019–28026, Doc. No. 111). The government argued that this material was not producible, since none of it could be used in evidence (Tr. 29179–29180, 29227, 29263–29265). In addition, the government stated on the record that it was not in possession of any illegal wire taps (Tr. 29228–29229). This second motion was merely a fishing expedition. It was only after full argument and discussion of other arrangements that the discovery motions were denied.

Thereafter, on February 15, 1962, after service of the government's bill of particulars, the court held an informal, off-the-record, conference with the government and with defense counsel in the hope that "by the time I get through with the Government and defense counsel there will be a very considerable amount

of additional material available to all defense counsel". This was being done, he explained, regardless of his previous orders disposing of the motions (Tr. 29304). Included on the agenda were a discussion of additional documents and information from the government and the possibility of stipulation as to authenticity or other formal facts (Tr. 29315). The primary purpose of the conference was to assist counsel in preparing for trial and to avoid surprise (Tr. 29316). At this meeting the government attorney gave defense counsel a list of 65 itemized records that were available in his office for inspection (Tr. 29329; see Doc. No. 137, Tr. 28432–28435). It was agreed that counsel would discuss and negotiate the admission into evidence of various documents without producing witnesses from the banks, brokerage houses and similar institutions. After the defense had seen the documents, they would consider stipulations as to the authenticity of specific items (Tr. 29332–29333). Pursuant to this agreement the government prepared a list of 44 institutions, enumerating the categories of documents associated with each (e.g., checks, minutes, etc.; see Doc. No. 139, Tr. 28442–28446), and drew up a proposed general agreement to negotiate in good faith as to the authenticity of any documents which could not be immediately agreed upon (Tr. 29353–29355). As to this group of documents, which Dardi now states were "the truly meaningful documents" (No. 164, Pet. 35), it was defense counsel who rejected the offer despite the fact that the government had no objection to a change in phrasing (Tr. 29354–29355; cf. No. 164, Pet. 35–36). As a result of this outright

rejection, the government was forced to call numerous documentary witnesses.[6]

Everything required under *Bowman Dairy Co.* v. *United States*, 341 U.S. 214, was offered, but counsel for Dardi neglected to avail themselves of the opportunities offered.[7] Even so, the judge, who approached the motions in terms of "fundamental fair play" (Tr. 29394), repeatedly stated that, if necessary, he would adjourn the trial if the defendants were confronted with a mass of unfamiliar documents (Tr. 29398-29399, 29406, 29416). The court noted that it was dealing with experienced counsel (Tr. 29415) and, that, since this case—unlike the typical tax or anti-trust case—would require the testimony of live witnesses, as well as merely documentary evidence, he preferred to get the case "underway" (Tr. 29418-29419). Less than 10% of the documentary evidence was introduced through the first witness, who was on the stand from March 9, 1962, until May 25, 1962, including a recess for illness. Dardi's counsel did not have to commence his cross-examination until seven weeks after trial began.

[6] In fact even during trial after once agreeing to the authenticity of certain bank checks, defense counsel were allowed to be relieved of the stipulation which necessitated a further government witness (Tr. 9136-9150, 10134-10138).

[7] Only one record was turned over to the United States Attorney's office by a defendant. This was available for inspection under Rules 16 and 17, F.R. Crim. P., and its discovery was not sought (Tr. 29390-29391; see also Tr. 29387). Only Berman and Swann availed themselves of the opportunity to see the government's records on a Saturday (Tr. 29393). Although some counsel sought and were allowed to inspect documents at the SEC, months before trial, Dardi's counsel did not apply for such permission until February 19, 1962 (Tr. 29388).

He had ample opportunity to prepare both before and during trial.

3. Curtailment of cross-examination

In contrast to the foregoing contentions, petitioner Dardi and Rosenthal complain of "curtailment" of cross-examination.

A. Witness Lehrich

Petitioner Dardi asserts that he was limited in the cross-examination of witness Lehrich (No. 164, Pet. 53–56). Lehrich testified on direct examination to his part in, and knowledge of, the Bender matter (see statement, *supra*). This testimony covered six pages (Tr. 18188–18191, 18193–18195). When Dardi's counsel sought to cross-examine Lehrich as to the whole conspiracy, he was limited by the trial judge to the matters covered on the direct examination. Even so, the cross-examination consumed 250 pages (Tr. 18417–19238). The limitation was in accord with the general federal rule. See *United States* v. *Minuse*, 142 F. 2d 388, 389 (C.A. 2), certiorari denied, 323 U.S. 716, which was particularly appropriate in view of the length of this trial. In any event, Lehrich was readily available (Tr. 19323) and counsel could have called him as part of the defense (Tr. 18447, 18451).

B. Witness Smith

Petitioner Rosenthal claims (No. 165, Pet. 29–34) because he was not permitted to read a list of questions to his own witness Smith in front of the jury, knowing that Smith could and would claim the privilege under the Fifth Amendment. Smith's claim of

privilege, based on his close relationship to the alleged conspiracy as a stock salesman in Rosenthal's firm, was undoubtedly valid (Tr. 23126–23128, 23162, 23168–23170), (see *Malloy* v. *Hogan*, No. 110, O.T. 1963, decided on June 15, 1964). Accordingly, petitioner had no right to present his case by leading questions to which the witness would refuse to answer on Fifth Amendment grounds.

4. Alleged misconduct of the prosecution

A. Cross-examination of McCollom (Raised in No. 164, Pet. 69-72)

Government witness Brann had testified against Dardi (see Statement, *supra*). Defense witness McCollom testified that Brann's reputation in Geneva, Switzerland, was "just as poor as it could be" (Tr. 19970–19971), and that Brann had given false testimony (Tr. 19882, *et seq.*).

On cross-examination, the government sought to show that McCollom had a motive to testify falsely and was biased against Brann. The government asked whether there was a warrant outstanding for his arrest in Geneva on charges of embezzling money (Tr. 19977, see 19979). McCollom denied it, and under the familiar rule against impeaching on a collateral issue, the government was bound by the answer. Contrary to petitioner's claim, there was sufficient basis for the question. McCollom admitted that the bank brought a claim against him which he had discussed with Brann (Tr. 19982, 19986–19989), and defense counsel conceded that there was not the slightest question but that the prosecutor had been so informed by Brann (Tr. 20044). In the context of this

lengthy and complex trial, this minor incident had no significance. Certainly it did not constitute such prejudicial error as to require reversal.

B. Government's summation (Raised in No. 164, Pet. 57–62)

Nor was it prejudicial error, as Dardi claims, for the government to devote a small portion of its summation to answering challenges as to its reason for not calling certain witnesses. Although complaining about the length of the trial, defense counsel, in their closing remarks to the jury, demanded an explanation as to why the government had not produced two additional witnesses involved in the conspiracy, Lehrich and Eveleigh.[8]

Thus, in regard to Eveleigh, Rosenthal's counsel stated (Tr. 25229–25231):

> * * * isn't it the duty of the government to say, "There are no other witnesses;" or "there are other witnesses who would only duplicate the testimony."
>
> * * * * * *
>
> * * * I can't tell you what Mr. Walpin [the government counsel] is going to say but I know that it would not seem reasonable to think he would say, "I didn't want this case to last too long so I didn't bring him in * * *."

Berman posed a similar challenge (Tr. 24936, 24991–24992):

> * * * Where is Mr. Eveleigh? The government didn't bring him in and the reason the govern-

[8] Co-conspirator Lehrich, who testified as to the Bender incident, was general counsel for United Dye. Co-conspirator Eveleigh was Guterma's bookkeeper (Tr. 728).

> ment did not bring him in is only one purpose, and the purpose was that the lists do not exist * * *.
>
> * * * * * *
>
> Mr. Walpin cannot say or give any reason, I don't believe, why these witnesses were not called, except that in his opinion as a competent attorney these witnesses would exculpate me and would disprove the contentions of the government in this case * * *.[9]

In these circumstances government counsel properly deemed it appropriate to make some response. His remarks indicate no personal knowledge of specific testimony. In substance he explained that Lehrich in fact had appeared, that both witnesses were readily available to the defense (Tr. 25546), and that the government's decision whether to call further witnesses was based upon a balancing of the sufficiency of the proof already adduced against the need of spending additional time on cumulative evidence (Tr. 25545). This explanation was clearly responsive to the challenges. Accordingly, in context, these remarks were not error. *Isaacs* v. *United States*, 301 F. 2d 706, 737–738 (C.A. 8), certiorari denied, 371 U.S. 818.

5. Transcripts of Berman's previous testimony

Petitioner Berman complains that it was unfair not to allow him to inspect his prior testimony before the New York Attorney General and before the SEC—testimony which was used by the government on

[9] See also remarks of Dardi's counsel on the failure to call Garfield (Tr. 25420–25421).

cross-examination (*Berman*, Pet. 18–20). The short answer is that, since Berman abandoned his request for the New York Attorney General's transcript and obtained a copy of the SEC testimony by other means, he can show no prejudice.

While Berman was under direct examination, the court denied his application for the New York transcript was premature (Tr. 23465–23467, 23539–23540, 23571). After the government, on cross-examination, had used certain questions and answers from the New York transcript, the court assured counsel that it would read the transcript to make certain that no unfair advantage had been taken by selective questions (Tr. 23755). Counsel said he thought it had been agreed that, after cross-examination, the transcript would be made available. The court suggested that counsel obtain the transcript of the discussion and "we will discuss it tomorrow morning" (Tr. 23756). No further request was ever made for the New York transcript [10] (although there was a further request for the SEC testimony, see *infra*) and the court made no final ruling.

The same procedure was followed as to the SEC transcript, which likewise was used on cross-examination and then reviewed by the court except that in this case counsel continued to press for permission to examine the document. The court below held that the request should have been granted but that, in the circumstances of this case, the denial was not prejudicial, since petitioner obtained a copy from another

[10] The trial court stated it did not contain any reference to United Dye (Tr. 23530).

source. After so doing, petitioner made no attempt to reopen the case to use the transcript but sought only to have it admitted in evidence, a request which was denied (Tr. 24083–24085). There has never been any showing as to how the transcript of his prior testimony would have aided Berman, who was unable to convince the jury of his innocence by his direct testimony on the stand. Under the circumstances, the court below, which has settled the procedure in that circuit for the future, was correct in ruling that the error in failing to produce the transcript did not warrant reversal of the conviction.

6. Substitution of counsel for Rosenthal (No. 165, Pet. 12–21)

In April 1962, there was an indication that Petitioner Rosenthal's attorney might be ill, and the court advised him to make arrangements for representation (Tr. 2973–2974, 2997). On May 10, 1962, petitioner's counsel was taken to the hospital and the court suggested that petitioner take immediate steps to obtain a substitute (Tr. 5263–5270, 5272). On May 14 petitioner advised the court that he had a lawyer, provided financial terms could be agreed upon. The proposed counsel claimed that he would need several months for preparation. The court thought that an adjournment of that length could not be granted, but agreed to consider a postponement until May 21 (Tr. 5307, 5308, 5321, 5324, 5328, 5331, 5336). On May 16 the lawyer refused to participate without at least a month and a half to make ready (Tr. 5339–5340). On May 17, after further efforts to retain counsel had come to nought (Tr. 5349, 5360),

the court appointed Mr. Edward Bobick, who then represented another defendant, a corporate brokerage house, and who, until May 10, had represented an individual defendant charged with acts similar to those of Rosenthal.[11] The court also offered to assign an office associate of petitioner's retained counsel, but this was declined (Tr. 5308–5309, 5276, 5359, 5367). Although Mr. Bobick objected to the appointment, claiming a conflict (Tr. 5375), the court could find none (Tr. 5277, 5359–5363),[12] and none is indicated in petitioner's brief. *Glasser* v. *United States*, 315 U.S. 60, cited by petitioner, is thus inapposite. In any event, Mr. Bobick's corporate client pleaded *nolo contendere* and was severed prior to any possible conflict, and appointed counsel agreed that he could properly and adequately defend petitioner (Tr. 16633–16634). In these circumstances no prejudice did or could result.

7. Issues as to wilfulness

A. The proof of the charge

Petitioner Berman contends that wilfulness was not sufficiently shown or properly charged (No. 166, Pet. 15–18). We disagree. The record shows that Berman dealt personally with Guterma at a meeting which he wanted no one else present. The jury could infer that he knew that only a control group could represent that such huge quantities of shares were available. Furthermore he was selling exchange stock at a com-

[11] The individual defendant had been severed after suffering a heart attack.

[12] On May 21, 1962, the court of appeals denied an application for a writ of prohibition which sought to block this assignment of counsel (Tr. 5439).

mission, partially unrecorded, which far exceeded the ordinary brokerage fee. He personally knew the market was being stabilized. He admitted that he made $300,000 on a $3,000 investment in the brokerage company (Tr. 23667–23668). In these circumstances the jury was justified in concluding that his participation was not innocent.

The court instructed the jury that, in order to convict, it was obliged to find beyond a reasonable doubt that each defendant knowingly and wilfully committed the elements of a crime. It defined "wilfully" as "knowingly, deliberately and with an evil motive or purpose" (Tr. 26414–26415). No exception was taken to this charge. The court also instructed that the government, in order to prove wilfullness, need not establish that the defendant knew he was breaking a "particular" law (Tr. 26415). This charge, while correct, was superfluous as to Berman, who admitted knowing that stock sold for a control group was required to be registered (Tr. 23845–23846).[13]

B. Charge on Rule 133 of the SEC (No. 158 Misc., Pet. 24–34)

Gravis requested that the jury be instructed to take into consideration, on the question of good faith, the uncertainty of the application of Rule 133, which provides that the transfer of shares on certain approved mergers shall not be considered a sale for reg-

[13] This is not a case like *Bloch* v. *United States*, 221 F. 2d 786, 789 (C.A. 9), where the jury had to presume that a defendant intended the natural consequences of his acts. See also *Morissette* v. *United States*, 342 U.S. 246, 273. Here there was much more than mere proof of the sale of the unregistered stock.

istration purposes under Section 5 of the Securities Act of 1933 (Appendix, *infra*). Such an instruction was unwarranted. There was no trial evidence (Gravis did not testify in his own behalf) to support *his* claim of uncertainty. No claim was made that Gravis had relied upon legal advice that the merger was exempt (cf. *United States* v. *Crosby*, 294 F. 2d 928 (C.A. 2), certiorari denied *sub nom. Mittleman* v. *United States*, 368 U.S. 984), and he can gain no aid from opinion letters received by Berman (Gravis Pet. 29). Indeed, those letters warned that the sale of unregistered stock was legal only if the shares were not being sold by a control group. Moreover, Rule 133, which applies to "no sale" shares distributed in a statutory merger, clearly does not purport to immunize such shares from registration requirements upon subsequent sales by officers or persons in control. The court was thus more than fair when, in charging the jury, it stated that if a man in good faith seeks advice of a lawyer, gives him all the facts, and honestly follows that advice he cannot be convicted of a crime which requires willful and unlawful intent, even if the advice is erroneous (Tr. 26418-26419).

8. Grand Jury investigation (No. 164, Pet. 62–69)

From December 18, 1961, until May 15, 1962, the government unsuccessfully sought to subpoena witnesses who could identify certain United Dye records. The first subpoena *duces tecum*, directed to the treasurer of Chemoil Industries, Inc., successor to United Dye (Tr. 2847), brought assurance from counsel for Chemoil (who was also Dardi's counsel) that the

documents were being collated (Tr. 28347). After numerous inquiries, defense counsel eventually filed a motion to quash, which was denied. On February 21, 1962, counsel stated that they would specify who could appear and identify the records (Tr. 28347–28351, 28353, 28355, 28363, 29312, 28596–28599). Upon commencement of the trial, the government made repeated but fruitless efforts to secure a witness to identify the records. On April 10, 1962, six weeks after the trial began, counsel for Szabo Food Services, Inc., successor to Chemoil, stated that he would locate someone to identify the records, but no one appeared, despite a second appearance by counsel and a further subpoena which prompted the court to suggest that the record warranted a contempt proceeding (Tr. 2837–2851, 2937–2954, 3692–3701).[14]

On May 9, 1962, two months after trial began, Illinois counsel for Szabo, advised the government that Mr. Timm would come from California on Friday, May 11, 1962, to identify a portion of the records (Tr. 5354–5355). Instead, Timm who had been Dardi's secretary (Tr. 1589), communicated with Dardi, who flew that week-end to California (Tr. 5355).

On May 15, 1962, the government called Mr. Timm before the grand jury and commenced an investigation (Tr. 5353). Dardi's counsel moved for a

[14] Chemoil's treasurer gave his subpoena to Dardi's counsel and informed the government he could not identify the records (Tr. 28599). Counsel for Szabo, instead of supplying someone to identify the records, gave the memorandum which the government had given him, to Mr. Kostelanetz, attorney for Dardi (Tr. 2937, 3695–3696).

mistrial to suppress all evidence and leads obtained from Mr. Timm (Tr. 5415–5418). The court read the grand jury testimony and, while noting that 45 out of 300 questions did not, on their face, clearly relate to compliance with the subpoena *duces tecum* (Tr. 7231), concluded nonetheless that the purpose of the proceding was not, even in part, to prepare for trial (Tr. 7235). At the trial, Timm merely identified records (see Tr. 6475–6488, 6530–6542, 6552–6574).

These facts establish that the government conducted a legitimate grand jury investigation into a possible criminal offense and was not using the grand jury as a device for obtaining leads for the trial which was already well under way. The procedure employed by the district court, in reading the transcript to ascertain whether the purpose was legitimate, was the proper method of determining the issue. See *In re Grand Jury Investigation* (General Motors Corp.), 32 F.R.D. 175, 183 (S.D.N.Y.), appeal dismissed, 318 F. 2d 533 (C.A. 2), certiorari dismissed, 375 U.S. 802; *United States* v. *Pack*, 150 F. Supp. 265 (D. Del.); *Application of Iaconi*, 120 F. Supp. 589 (D. Mass.); *Application of Texas Co.*, 27 F. Supp. 847 (E.D. Ill.).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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AUGUST 1964.

APPENDIX

Statutes and Regulations Involved

Section 2, paragraph 11, of the Securities Act of 1933, 48 Stat. 75, as amended, 68 Stat. 684, provides (15 U.S.C. 77b(11)):

> The term "underwriter" means any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commission. As used in this paragraph the term "issuer" shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer.

Section 4 of the Securities Act of 1933, as amended (68 Stat. 684), provides in pertinent part (15 U.S.C. 77d(1)):

> Exempted transactions.
>
> [Sec. 4.] The provisions of [Section 5] shall not apply to any of the following transactions:
>
> (1) Transactions by any person other than an issuer, underwriter, or dealer;
>
> * * *

Section 5 of the Securities Act of 1933 (48 Stat. 77), as amended (68 Stat. 684), provides in pertinent part (15 U.S.C. 77e(a)):

> [SEC. 5.] (a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—
>
> (1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or
>
> (2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

17 C.F.R. 230.133(a) (SEC Rule 133) provides:

> DEFINITION FOR PURPOSES OF SECTION 5 OF THE ACT OF "SALE", "OFFER", "OFFER TO SELL", AND "OFFER FOR SALE".
>
> (a) For purposes only of section 5 of the act, no "sale", "offer", "offer to sell", or "offer for sale" shall be deemed to be involved so far as the stockholders of a corporation are concerned where, pursuant to statutory provisions in the State of incorporation or provisions contained in the certificate of incorporation, there is submitted to the vote of such stockholders a plan or agreement for a statutory merger or consolidation or reclassification of securities, or a proposal for the the transfer of assets of such corporation to another person in consideration of the issuance of securities of such other person or voting stock of a corporation which is in

control as defined in section 368(c) of the Internal Revenue Code of 1954, of such other person, under such circumstances that the vote of a required favorable majority (a) will operate to authorize the proposed transaction so far as concerns the corporation whose stockholders are voting (except for the taking of action by the directors of the corporation involved and for compliance with such statutory provisions as the filing of the plan or agreement with the appropriate State authority), and (b) will bind all stockholders of such corporation except to the extent that dissenting stockholders may be entitled, under statutory provisions or provisions contained in the certificate of incorporation, to receive the appraised or fair value of their holdings.

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OCTOBER TERM, 1964

No. 164 [redacted].

VIRGIL D. DARDI,

Petitioner,

—v.—

UNITED STATES OF AMERICA.

REPLY BRIEF

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REPLY BRIEF

Statement

Petitioner Virgil D. Dardi submits this Reply Brief in answer to the brief of the Solicitor General in opposition to the petition for a writ of certiorari ("S. G. Brief").

The Facts

The Solicitor General's brief has glossed the record and misstated facts. He has placed Mr. Dardi at the heart of Guterma's matters, although the record is clear that he was an outsider and not one of Guterma's true partners.

(i)

(S. G. Brief, pp. 4-5)

It is not a fact that Mr. Dardi arranged for the purchase of shares of United Dye stock for Guterma with any venal

purpose to sell unregistered stock or bilk United Dye. Guterma's testimony was that Mr. Dardi wanted Guterma to purchase stock and join United Dye for only the highest motives—to benefit the company itself (*e.g.*, 3379-86a, 3387-88, 3388-91, 9682; Def. **Exhs.** AA and K).

(ii)

(S. G. Brief, p. 5)

It was Guterma's testimony that his manipulations with Garfield and Pasternak to acquire Franklin County Coal Corporation were all achieved without consultation with, and the knowledge of, Mr. Dardi; Mr. Dardi never had an interest in Franklin; in fact, Guterma constantly touted Franklin as a very good investment for United Dye to Mr. Dardi at all times prior to the Handridge-United Dye merger (*e.g.*, 755-58, 3956-60, 787, 788-90, 919).

(iii)

(S. G. Brief, p. 5)

There was no evidence whatsoever that Mr. Dardi had or used "nominees" to secure for himself a single share of the 75,000 shares of United Dye stock as part of the "merger arrangements."

(iv)

(S. G. Brief, p. 6)

The citations of the Solicitor General to the record do not support the statement that Mr. Dardi sold any United Dye shares in order to reduce the price of the stock at the time of the Handridge-United Dye merger (923-29, 1187). The only persons who deliberately sold stock to reduce the market price in anticipation of the Handridge-United Dye

merger were Guterma, Garfield and Pasternak; and Mr. Dardi was not present and never participated in their plot (927-28). In fact, Guterma hid his group's market activity in the United Dye stock from Mr. Dardi and threw Mr. Dardi off the scent by accusing Mr. Dardi of selling stock without Guterma's knowledge (*e.g.*, Def. Exhs. II, JJ; 3883, 3918-27, 3939-41; Gov. Exh. 14).

(v)

(S. G. Brief, p. 6)

It is true that Mr. Dardi arranged to have United Dye obtain control of Bon Ami; but he did this because it looked like, and was, a very good deal for United Dye; and in fact it proved to be a great boon to the company (*e.g.*, 1343-44, 1345-47).

(vi)

(S. G. Brief, p. 7)

Mr. Dardi was not a party to an agreement to sell United Dye shares after the Handridge-United Dye merger and was not present at any such agreement-making (1644-45); the Solicitor General's citations do not support any such inference and Mr. Dardi's name never appears on the pages cited (1587-1601, 1620, 16725). The facts are that Mr. Dardi did not own a single share of the stock coming out of the merger and did not make a cent from the distribution of profits by Guterma and his true partners (*e.g.*, 3373-74, 3359-74).

(vii)

(S. G. Brief, p. 7)

It is disturbingly untrue that (a) Mr. Dardi "convinced" a "conspirator" not to sell stock coming from the Hand-

ridge-United Dye merger and (b) that Mr. Dardi "arranged" to set up "an over-the-counter boiler room operation" for the sale of that stock. It was Guterma—and Guterma alone far from Mr. Dardi's presence—who convinced his co-conspirator Pasternak to stop selling United Dye stock on the market following the merger (1590-1601). Guterma's testimony was clear that Mr. Dardi had nothing to do with that event or the events that followed (1590-97). After Guterma persuaded Pasternak not to sell, Guterma arranged the distribution without consulting Mr. Dardi and through the use of his own close associates (*e.g.*, 1600-01, 9174-75, 9178-80, 16693-762).

(viii)

(S. G. Brief, pp. 7-8)

Mr. Dardi did not arrange for Hughes to use his brokerage account.

(ix)

(S. G. Brief, p. 8)

Guterma never testified that Mr. Dardi introduced him to Herman Brann as part of any stabilization program (*e.g.*, 1664-65, 4302-03). Guterma contradicted Brann's later testimony that Mr. Dardi secured part of Brann's commission or profits—as made clear by the citation of the Solicitor General (1673; see also 1669-72, 4415-16).

(x)

(S. G. Brief, p. 8)

According to Guterma, Mr. Dardi was not told by him that "nominees" were going to sell United Dye stock for Guterma and his group shortly after the Handridge-United

Dye merger and was not a party to discussions of such a plan (1644-45); the Solicitor General's citations to the record of Mr. Guterma's testimony are no support for the contrary proposition (808-17, 880-82, 1594-97).

(xi)

(S. G. Brief, p. 8)

The publicity materials shown to Mr. Dardi by Paul Hughes were a 95% reprint of United Dye annual reports (12008 *et seq.*).

(xii)

(S. G. Brief, p. 11)

The Solicitor General ignores the fact that Guterma testified that Mr. Dardi would have nothing to do with the so-called Bender matter (1797-98).

(xiii)

We have here but tried to illustrate how the Solicitor General has glossed the record. Our petition provides the more detailed answer to the aim of the Solicitor General to read Mr. Dardi into the heart of Guterma's plots. We repeat again: the jury had ample evidence to find that Mr. Dardi was not a party to the conspiracy alleged in the indictment; Guterma's testimony formed a strong basis to exculpate Mr. Dardi completely.

ARGUMENT

1. *Length of Trial.*

In our petition, we showed that this case was transformed from an estimated 6-to-8 week trial to an 11½-month trial by unnecessary colloquy that ate up more than half the transcribed record (Petition, pp. 41-42). The Court of Appeals conservatively said the jury "was subjected to four months of enforced attendance at the debating contest."

Now the Solicitor General suggests that the inordinate length of the trial in the District Court had mostly to do with the complexity of the trial and the number of defendants. This is plainly not so. Well over half of the record here—and what would have been thousands of pages in off-the-record discussions—had nothing to do with the complexity of the trial; it was colloquy that ate up time, that devoured months of time (see Petition, pp. 42-45).

Without citation to the record, the Solicitor General states the colloquy was "largely of [petitioners'] own counsel" (S. G. Brief, p. 14). That is not so, either. Despite the fact that there were many more defense counsel than Government counsel, the talking as between the defense and the Government was about equally divided; the trial court led all sides. And the great bulk of counsel's talking was not only invited by the trial court, but done at the insistence of the trial court. Defense counsel and Government counsel are, of course, under a duty to speak when the court wants them to speak and to argue their case as fully as is required; this was recognized by the trial court (5587, 20827).

In seeking reasons for the length of the trial, the Solicitor General notes that the trial court said twice on the record that an inordinate amount of time supposedly was

being taken by defense counsel between questions and "rummaging around for papers" (12034-35, 36701). The colloquy figures reduce this supposed source of time-consumption to a filament. The Solicitor General—in grasping at these two comments by the District Court—only highlights the fact that defendants were prejudiced into "rummaging around for papers" in front of the jury because they did not have proper pretrial discovery and were confronted with the difficulty of cross-examining upon papers newly shown to them (*e.g.*, 7381, 7595, 9354, 15494-96, 18315-16).

Next, the Solicitor General suggests that one of the great causes for the length of trial was the time taken by the many defendants on cross-examination (S. G. Brief, p. 14). In its brief to the Court of Appeals, the Government estimated that its direct case, apart from colloquy, should have taken about 4 weeks (Gov. Brief to Court of Appeals, pp. 141-42). Under the Government's formula, which was based on the number of pages devoted more or less to some testimony, defendant's cross-examination of witnesses should have taken no more than 6 or 7 additional weeks.

Finally, the Solicitor General sees no prejudice in all events. We have stated our position concisely in our petition for a writ of certiorari and respectfully refer the Court to it (Petition, pp. 47-52).

2. *Pretrial Discovery.*

The Solicitor General argues that Mr. Dardi's discovery motions under Rules 17(c) and 16 of the Federal Rules of Criminal Procedure were not well grounded; then he argues that, in any event, everything required under this Court's decision in *Bowman Dairy Co.* v. *United States*, 341 U. S. 214 (1951), was in fact offered to defense counsel, who

must take the responsibility for not viewing the material (S. G. Brief, pp. 15-20).

In making both points, the Solicitor General errs on the facts and the law.

The first 29 categories of documents covered by Mr. Dardi's original motion for discovery and inspection covered the most vital type of documentary evidence in the case: letters, checks, memoranda and the like that went to the heart of the alleged conspiracy (27577-80). While the Government claimed to have returned many originals to the companies of individuals involved (28278), there is no question that the Government retained many hundreds of such documents—either copies or originals—for many years and throughout the trial (29221-29222).

Items 30 through 54 of Mr. Dardi's motion asked for the documentary ingredients that went into the frauds as pleaded in Counts 6 through 30 of the indictment; the prosecution was later to volunteer only confirmations and brochures. The fact that Mr. Dardi was not named as the defendant in Counts 6 through 30 does not mean that these items were "not discoverable" as the Solicitor General now urges. For proof of those counts were, on the Government's theory, relevant to proof of the conspiracy count (see Gov. Brief in Court of Appeals, pp. 137-38). And certainly the particulars on the counts which did not involve Mr. Dardi directly were the ones on which he most needed discovery.

As to Item 55, the Solicitor General states that Mr. Dardi and his co-defendants could have inspected these statements made to the SEC at the New York office of the SEC (29352). The Solicitor General does not mention that defense counsel did go to the SEC office before trial to look at testimony, but they were prohibited from taking any notes (27146,

29414-15). That rule was only changed for them eight days before trial after complaints to the trial court (29211, 29214-17, 29420, 29345 *et seq.*). And no defense counsel could see anything but the minutes of the testimony of his own client (*ibid.*).

In a supplementary request for inspection, Mr. Dardi's counsel asked for correspondence and written communications among defendants and co-conspirators during 1955, 1956 and 1957—the crucial years involved (29178, 28019-26). The Solicitor General justifies the denial of this request by noting that in the district court the Government argued that the material was not producible since none of it could be used in evidence (S. G. Brief, p. 17). The fact of the matter is that the correspondence among defendants and alleged co-conspirators was admitted in evidence and proved to be the most fruitful source of claim and counterclaim (*e.g.*, Def. Exhs. H, JJ, K). What correspondence in the hands of the Government may have contained helpful admissible evidence, petitioners shall never know.

Finally, the Solicitor General has failed to advert to motions made by other defendants for discovery and inspection of documents, of which all defendants had the benefit (27577 *et seq.*, 27421-37, 27340-43).

Actually there is no question that (i) all the evidence that the Government introduced at trial would have fallen under the categories delineated by the various motions of defendants, (ii) the documents that the prosecution later offered to show shortly before trial, but under restrictions, would have also fallen under those categories, and (iii) the Government was the only available source for the documents.

The Solicitor General now argues, as the Government did below, that there were adequate substitutes for a proper discovery.

In our petition, we have shown all the so-called substitutes and offers for production of documents were meaningless gestures at discovery (Petition, pp. 34-37). The Solicitor General in justifying the Government's "substitutes" has made out a fact pattern that bears no resemblance to what happened (S. G. Brief, pp. 17-18). We will try to set the record straight.

The list of 68 itemized records that were available at the office of the United States Attorney's office were offered 12 days before trial. The records covered were nothing but voluminous accounting records of brokerage houses, the bulk of whose pages were irrelevant. Those documents were in cartons in two rooms; less than 1% of the documents had ever been seen by Mr. Dardi's counsel before; it took some 12 to 13 hours for defendant Swann, an attorney, to examine only part of the first category of documents (29414, 29377, 29410-11). Defense counsel noted the fruitlessness of combing through cartons of brokerage records on short notice without reference to relevant pages; it would have taken months of work not 12 days, although counsel were prepared to do that if time was allotted to them (29410-11).

Following the offering of this list of 68 types of records, the Government produced a second list of documents—placed in 44 categories. The documents in these categories were not to be turned over unless the defendants made certain concessions, at first unspecified (29353, 28442). The trial court suggested that counsel should enter into a stipulation of authenticity which would cover specifically enumerated documents, *after* defendants had seen the documents (29353).

It was the prosecution that did not follow the court's suggestion concerning a stipulation in covering this second list. Its offered stipulation called for defendants to sign up with-

out first seeing the documents; there was no provision for the manner, place and time of production; there were no specific designations of documents as contemplated by the trial court; defense counsel were expected to review every single document among thousands and state specific objections or waive their rights forever in the 7 days that remained before trial; the bona fideness of objections was not to be determined by counsel but was to be determined before trial by the trial court (29354-55, 29375-428). While the prosecution was willing to change the phrasing of its stipulation, it was unwilling to change the substance of its requirements and would consent to no adjournments to allow for inspection (*ibid.*). The stipulation was refused.

Accordingly, it was not a fact that everything required under the *Bowman Dairy Company* case was offered; nothing was offered in any meaningful way before trial.

We find it strange that the Solicitor General relies on the fact that the trial court stated that if necessary it would adjourn the trial during the course of the trial if defendants were confronted with a mass of unfamiliar documents; for the trial court recognized that if there were "goes and long stops" at trial, defendants would be prejudiced (29408). Moreover, defendants could never see most of the documents covered by their motions no matter what sort of adjournments would be given, because they were never offered in evidence by the Government.

Finally, we do not understand what comfort the Solicitor General gets from the fact that "less than 10%" of the documentary evidence was introduced through the first witness, Guterma (S. G. Brief, p. 19). Guterma was the key to the Government's success; it was most necessary for defendants to have available all the documents that went to the essence of the case while he was on the stand.

3. *Mr. Dardi's Other Points for Review.*

The Solicitor General's brief runs away from most of the other legal issues raised by our petition.

In dealing with our point concerning the limitation of cross-examination of Lehrich, the Solicitor General says not a word about the fact that Lehrich's conduct and his statements were admitted through other witnesses against Mr. Dardi under the law of conspiracy (S. G. Brief, p. 20). The cross-examination of Lehrich (with attending colloquy) may have consumed 250 pages, but it was confined to the Bender matter. In view of the law of conspiracy, we submit again that "the general federal rule" amounted to a deprivation of the right to confront Lehrich on his own statements and acts already in the record for the Government.

The Solicitor General's argument that Lehrich might have been called by the defendants, if adopted as an excuse, would allow any Government witness to escape without cross-examination. It is a silly argument; and here the trial court refused to rule that leading questions could be put to Lehrich if he were called by the defense (18451, 18619-41).

In turning to the prosecutor's asking defense witness McCollom about a supposed arrest, the Solicitor General does not mention *Michaelson* v. *United States*, 335 U. S. 469 (1947) and the rule of reliability that the case lays down—and thereby misses the whole point (compare Petition, pp. 69-72; with S. G. Brief, pp. 21-22).

As to the prosecutor's several statements to the jury that the two conspirators Eveleigh and Lehrich would have testified cumulatively for the Government, the Solicitor General argues that the prosecutor was justified because of statements by one defense counsel (not Mr. Dardi's) and

a defendant appearing *pro se* in their summations concerning the witness Eveleigh.

Mr Dardi is not responsible for what other defense counsel and defendants say. And most clearly, as the Court of Appeals found, what was said by defendants did not justify the repeated statements of the prosecutor—on both Eveleigh and Lehrich. For there is no doubt that the prosecutor vouched for what these two witnesses would have said on the merits; he injected and re-injected a claim of personal knowledge. His words could not be clearer (25546, 25548, 2551, 2551-52; Petition, pp. 59-60). The jury could take it for nothing else but personal knowledge. Lehrich had taken the stand and the jury knew that he had been interviewed by the prosecutors and had testified before grand juries (18470-71, 19041-43, 19183, 19187).

Lastly, it is clear on the record below that the prosecutor did call a prospective witness before the grand jury during trial and there went beyond any proper scope of examination into any alleged obstruction of justice by delving into matters relating to the pending case.

The trial court did not find, as the Solicitor General now suggests (S. G. Brief, p. 30), that the prosecutor's purpose was not "even in part" to prepare for trial (7235). That is another gloss. The trial court's opinion talked in terms of "the sole or dominant purpose" of the prosecutor and found 45 questions that did not seem to relate to the obstruction of justice "investigation" (7231, 7232). In any event, the trial court's subjective conclusion has no significance. The Solicitor General does not even argue the "sole or dominant purpose" rationale here (S. G. Brief, p. 30). The fact is that the prosecutor used the grand jury to aid a pending case. Therefore, he abused grand jury process.

CONCLUSION

For the reasons stated in our petition we urge again that this Court grant Mr. Dardi's petition for a writ of certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1964

No. 165

CHARLES ROSENTHAL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

CHARLES ROSENTHAL,
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IN THE

Supreme Court of the United States

October Term, 1964

No. 165

CHARLES ROSENTHAL,

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v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

Petitioner pro se hereby applies for rehearing of the Order of this Court, dated October 12, 1964, denying his petition for a writ of *certiorari* to review the judgment of the Court of Appeals for the Second Circuit, which affirmed his conviction and sentence for conspiring * to violate the securities laws and to defraud the United States by impeding the functions of the Securities and Exchange Commission, and for the illegal sale of unregistered securities. **

Reasons for Granting Rehearing

Whether the government failed to establish the single conspiracy charged insofar as the evidence viewed in a light most favorable to the prosecution, established a con-

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* 18 U. S. C. § 371.

** 15 U. S. C. § 77e(a)(1), 77X and 18 U. S. C. § 2.

spiracy between some defendants fraudulently and by criminal means to create and acquire a large block of control stock in the "United Dye" Company, and a later, separate conspiracy with the broker-defendants, including appellant, of a very definite outline, namely, to sell such stock to the public and to stabilize the price of such stock through such sale.

The eleven-month trial established two separate and distinct conspiracies rather than the single conspiracy charged. Enormous prejudice to petitioner resulted from such variance.

In addition, by far the greater part of the evidence and time consumed in the trial concerned matters both immaterial and prejudicial to petitioner's case.

I respectfully refer this Court to the statement of the evidence in the opinion of the Court below and my petition for certiorari (pp. 5-6) in this regard.

The Government Failed to Prove the Existence of the Single Conspiracy Charged in Count One. Appellant Was Thereby Severely Prejudiced

Assuming *arguendo* the sufficiency of the evidence, and viewing it in a light most favorable to the government, the proof established two separate and distinct conspiracies.

The evidence against petitioner, at most, shows that he embarked upon a criminal venture of very definite limits. He was concerned, at most, with the illegal sale of unregistered control stock and market manipulation (G. Br. 81-2, 84-7).* The government sought to establish the illegality of the stock sales by attempting to show that pe-

* References to the government brief herein referred to relate to the government brief in the Circuit Court.

titioner made the sales with knowledge that the stock was "control stock. Market manipulation, illegal in any event (15 U. S. C. 78i), was asserted by the government to have been an incident of the stock distribution (G. Br. 29, 104-118).

Most of the government's evidence, however, was concerned with a different conspiracy among some of the defendants (not the broker defendants of whom petitioner was one) fraudulently to create and distribute among themselves, half a million shares of United Dye stock (G. Br. 32-76). Most of the trial, just as most of the statement of facts in the government's brief, concerns Guterma's intricate and fraudulent machinations to obtain the stock for relatively worthless consideration—in other words, to steal the stock from United Dye (G. Br. 37-76). The proof went even beyond that and showed that Guterma looted the Bon Ami Company as well (G. Br. 64-71).

The government did not attempt to establish (for it could not) that petitioner took any part in those crimes or that he had any stake in them. Moreover, the government evidence itself establishes petitioner's lack of complicity in those crimes. Thus, the government evidence is that "Guterma orally informed petitioner that [the control] shares were obtained by the means of the merger between United Dye and Handridge" (G. Br. 175). Since Guterma found it necessary to tell this to petitioner, after the fact, it shows conclusively that petitioner had no part in that fraudulent merger *.

Since the government concedes that petitioner's first participation in the alleged conspiracy came after the Handridge-United Dye merger and the commission of the

* The record also shows that knowledge of the fraudulent and criminal character of the Handridge transaction is not attributable to petitioner. However, petitioner's lack of such knowledge is not necessary for a showing that two separate and distinct conspiracies were established.

crimes related to that transaction, the government's theory of liability with respect to petitioner would seem to be that he joined the existent Guterma conspiracy in order to effectuate what the government characterizes as the last "phase" of the conspiracy, viz. to illegally sell the half-million United Dye shares to the public. The connection, however, is no more than purely verbal. It is perfectly plain that after stealing the United Dye stock the Guterma group could have retained it or could have sold it without adding new crimes in selling the stock. And, had the Guterma group acquired the control stock of United Dye by means perfectly legal and legitimate, such fact would in no way bear upon, or be relevant to, petitioner's conviction of the crimes with which he was charged—the sale of unregistered control stock, a related endeavor to stabilize the price of such stock, and conspiracy to do those things. Similarly, and for the same reasons, the criminal means by which the Guterma group obtained such stock is equally irrelevant to the case against petitioner—as irrelevant as would be evidence that the stock was acquired through a bank robbery or any other crime. The government has not argued to the contrary.

The means by which the government would seek to link Rosenthal with the Guterma group conspiracy to fraudulently create and acquire the United Dye shares, are either totally ineffectual for that purpose or make plain petitioner's lack of complicity.

The government offers that Guterma orally advised Rosenthal that the control stock was obtained by means of the Handridge merger (*supra*, p. 3). Apparently the government would suggest that this evidence is in some way relevant to the question whether the government failed to establish the existence of a single conspiracy.

What bearing such evidence has is difficult to conceive.* It is plain that the manner in which the shares were acquired by the control group is not relevant to the government's case against Rosenthal (*supra*, p. 4).

It was suggested that the circumstances surrounding the merger were relevant to counter a possible defense that the sales were legal because Rule 133** exempts mergers. If "merger" were in fact a defense, a fraudulent merger would remain just as much a defense, particularly if petitioner and the other broker defendants knew nothing about that fraud. However, Rule 133 only exempts from registration requirements the original transfer of shares to the shareholders of a merged corporation. It in no way exempts a subsequent sale of unregistered stock by those shareholders if they are control persons or are members of a control group. *United States* v. *Crosby*, 294 F. 2d 928 (2d Cir., 1961); *S.E.C.* v. *Culpepper*, 270 F. 2d 241, 247-8 (2d Cir., 1959). The government recognizes this (G. Br. *e.g.*, 79, 83, 178).

Prior to the decision in these cases there may have been some uncertainty about its application. However, the principal defendants cannot claim to have acted in good faith. If the government evidence be credited, they furnished the brokers with letters denying that the stock was control stock (the letters did not rely on Rule 133). They also utilized nominees so that the control character of the stock would not be readily apparent (G. Br. 81-84). Clearly, if defendants entertained the notion that the acquisition of the stock by means of a merger made it "exempt" even

* It should be noted that Guterma testified only that he told Rosenthal of the fact of the merger—not any details concerning it or its fraudulent character. Of course, as chief swindler and executive of the control group, seeking to obtain a selling force for his stock, he would hardly volunteer to the brokers information concerning his unrelated crimes perpetrated upon the United Dye Corporation.

** 17 C. F. R. 230.133.

though control stock, they would not have gone to such lengths to conceal its control character.

Of course, the fact of Guterma's advising petitioner of the merger establishes beyond peradventure that petitioner was not in any way implicated in that crime, for, it shows that it was necessary for him to be informed of the very fact of the merger.

The government also argues that the evidence shows a single "conspiracy involving a progressive series of interrelated transactions" common to narcotics "chain" conspiracies (G. Br. 174). The government cites *United States v. Agueci*, 310 F. 2d 817 (2d Cir., 1962), cert. denied 372 U. S. 959 (1963). It concedes, as it must, that the *Agueci* case involved a typical narcotics "chain" conspiracy and the ordinary functional division of labor common to the illegal importation and sale of narcotics. Of course, the *Agueci* case, as all narcotics conspiracy cases, was a prosecution under the narcotics conspiracy statute (21 U. S. C. 174) which requires as a necessary element for the conviction of conspiracy to sell narcotics, knowledge that the narcotics were illegally imported. Naturally, a prosecution, as this one, for conspiracy to sell unregistered securities, does not deal with contraband and knowledge of the means by which the control stock was acquired is not relevant.

The government mistakenly suggests that petitioner bases his attack upon "the assumption that a single conspiracy cannot exist unless each conspirator knew each step of the conspiracy and all other conspirators" (G. Br. 174). It cites two cases dealing with conspiracies of an "indefinite outline" which hold that acts by conspirators in furtherance of such a conspiracy are attributable to co-conspirators ignorant of such acts. It has already been shown (*supra*, pp. 2-4) that Rosenthal's conspiracy, if any, had a definite and limited scope, namely, to sell unregistered control stock (however acquired) and to stabilize the

price of that stock.' Consequently, the government's contentions are not relevant.

In fact, *Crosby* and *Andolschek*, although relied upon by the government, bear out petitioner's position. In *Andolschek* (142 F. 2d 503), the evidence showed that the acts of co-conspirators sought to be attributed to the defendant were in furtherance of the "common purposes" of the conspiracy as he understood them. Judge Learned Hand expressly limited the scope of that decision. Thus (at p. 507) he warned:

> "It is true that at times courts have spoken as though, if A. makes a criminal agreement with B., he becomes a party to any conspiracy into which B. may enter, *or may have entered*, with third persons. That is of course an error: *the scope of the agreement actually made always measures the conspiracy*, and the fact that B. engages in a conspiracy with others is as irrelevant as that he engages in any other crime." (Emphasis added.)

Learned Hand, speaking for the Court below, many times articulated the rule which makes plain the government's failure to prove a single conspiracy, as charged, in this case.

In *United States* v. *Peoni*, 100 F. 2d 401, 403 (2d Cir., 1938) he stated the rule thusly:

> "Nobody is liable in conspiracy except for the fair import of the concerted purpose or agreement as he understands it * * *."

In *United States* v. *Falcone*, 109 F. 2d 579, 581 (2d Cir.) aff'd 311 U. S. 205 (1940) he held that for one to join in the conspiracy of others:

> "* * * he must in some sense promote their venture himself, make it his own, have a stake in its outcome. The distinction is especially important today when so many prosecutors seek to sweep within

> the drag-net of conspiracy all those who have been associated in any degree whatever with the main offenders. That there are opportunities of great oppression in such a doctrine is very plain, and it is only by circumscribing the scope of such all-comprehensive indictments that they can be avoided."

How completely apposite to this case are Judge Hand's statements.

United States v. *Crosby*,* 294 F. 2d 928 (2d Cir., 1961) (Gt. Br. 175), similar to this case, involved a prosecution for wire and mail fraud, the sale of unregistered securities, and a conspiracy for those purposes through the acquisition, by fraudulent means, of control of a corporation and the subsequent sale of control stock to the public without registration. This Court reversed the substantive and conspiracy convictions of the broker defendants. It explained the inadequacy of the evidence against the other defendants—the control group—thusly (at p. 945):

> "There was ample evidence here to justify a finding that the *non-broker defendants* were a part of an overall scheme to acquire and exploit a public corporation for the ultimate purpose of selling to the public unregistered common stock." (Emphasis added.)

Thus insofar as the *Crosby* case is analogous to this one, this Court there merely recognized what should be obvious—that Guterma and the other non-broker defendants may have entered into a single conspiracy to violate more than one federal law by fraudulently acquiring control stock of United Dye and later distributing that stock without registration.

It has been shown (*supra*, pp. 2-5) that the government has offered no more to connect petitioner with that Guterma

* In *Crosby*, eight defendants went to the jury on a fifty-Count indictment charging conspiracy and violation of the S.E.C. laws. The "protracted jury trial" took fifteen weeks.

conspiracy than Guterma's testimony that he told petitioner that the control stock had been obtained by the means of a merger.

No matter how the government's proof is viewed, Rosenthal can only be charged with having embarked upon a criminal venture of a very definite outline—to sell, for a price, unregistered common stock, however acquired by the control group, and to participate in an effort to stabilize the price of that stock on the Stock Exchange. The government has proved, assuming the adequacy of its evidence, a separate "control group conspiracy" much broader in its purposes and differing in illegality.

The prejudice to petitioner by the government's proof of a second unconnected conspiracy could not be more plain. The greatest part of the eleven month trial involved the intricate and fraudulent machinations of the Guterma "master-mind" group in acquiring United Dye stock and in looting United Dye and Chemical Corporation and the Bon Ami Company of millions of dollars (G. Br. 32-76). The prosecutor himself stated in oral argument that the brokers could have been tried in four days. It would be absurd to argue that to subject petitioner to an eleven month trial, instead, is not prejudicial. *Kotteakos* v. *United States*, 328 U. S. 750, 756 (1946).

Petitioner's conviction under Count One must be reversed and the Count dismissed for inadequacy of proof. His conviction under the substantive Counts must be reversed because of the prejudice to him resulting from the mass of evidence presented to the jury under the all-inclusive conspiracy Count, charged, but not proved, by the government.

CONCLUSION

For the reasons set forth above, this Court should grant rehearing.

Respectfully submitted,

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Petitioner, Pro Se

Certificate of Good Faith

I, being the petitioner *pro se*, do hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

CHARLES ROSENTHAL,

Dated: December 4, 1964.